

**AUSTRALIAN ENERGY MARKET
COMMISSION RETAIL
COMPETITITON REVIEW
GAS AND ELECTRCITIY MARKETS
FIRST DRAFT RESPONSE**

2ND OPEN DRAFT SUBMISSION

Dynamic work in progress

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PREAMBLE

I write again as a concerned Victorian citizen about the implications of the competitive process, energy policy and impact on consumers, pending full retail price regulation in the and lightening of the regulatory burden within the energy industry.

Based on its assessment the Australian Energy Market Commission (AEMC) will recommend to the State Government whether retail price regulation is required in the future. Victoria is the first jurisdiction to be reviewed. It is of some concern that despite the Review being incomplete, policy considerations appear to be at quite an advanced stage. Parallel with the Productivity Commission's Inquiry into Australia's Consumer Policy Framework there are a number of other reform initiatives underway.

As an end-consumer and late-comer I am already confused about the framework for raising concerns initially and on ongoing basis. I had begun with examination of Allens Arthur Robinson's Consultation Paper June 2007 to which I have gained recent access after making other enquiries about submission for the National Framework for Energy Efficiency.

This is my first substantial venture into active participation in the consultative processes as a lone end-consumer joining the ranks of stakeholders more seasoned, some more cynical, on the basis of length of exposure and familiarity with the pitfalls that the Australian community will face with imminent price deregulation following on approximately five years after full retail competition was introduced into the energy market.

I wish I had had the time to further tidy up the presentation of this hurriedly assembled material from various sources. Rather than wait for the time and opportunity to do this and miss the publication deadline I am submitting this as a draft work in progress for publication as is, in the hope that a tidier version will be available at some stage to replace it. If not, my intentions were good and I would rather present some data than none.

As a separate exercise I hope to target in more detail some of the consumer policy issues raised with a backwards glance at least to the beginning of plans for full retail competition by way of obtaining some form of baseline comparisons since none appear to have been cited by the AEMC Retail Review.

The report of the South Australian experience as reported in Wesley Voice's Spring Quarterly 2004¹ may be a good example to use as a base line comparator. Frankly little has changed, but now with price deregulation around the corner – the wheels might fall off the cart unless an Act of God intervenes. *(See full discussion and direct citation pp 204-206)*

As a concerned private citizen alarmed at the pace and the manner in which decisions are being made to effect energy reform, I write again to address jointly some of the issues under scrutiny by the Retail Competition Review, the MCE Market Reform Team and the Productivity Commission. My concerns are not new. They have been expressed for many years, often by those whose exposure to the industry spans well over two decades. I have not reached my first anniversary yet. Time availability and rushed deadlines has not permitted proper examination of the extensive documentation associated with the Review of Retail Competition in Gas and Electricity Markets First Draft Report dated 5 October 2007.

¹ Wesley Voice Spring Quarterly 2004 pgs 1-8 Low income people and energy choices – background to SA Energy Market; and Characteristics of Economic Goods/Services and 'Essential Services' p 9 found at <http://www.unitingcarewesley-sa.org.au/Portals/0/WesleyVoice%20Issue%201%20--%20Spring%202004.pdf>

INTRODUCTION

It is difficult for a lay individual end-consumer to know where to begin with providing feedback and comment on the processes being undertaken by the Australian Government to determine the fate of energy markets in the light of serious consideration being given to the option of complete deregulation of retail prices.

Nevertheless, I again add my lone voice to those of consumer organizations who have already expressed serious and sustained reservations about the Commission's decision to consider deregulation the energy market or to revert to more generic consumer protections under trade practice or fair trading provisions alone.

I feel strongly that energy-specific regulation needs to remain in place, whilst standardization and rationalization may be warranted. Consumer protection and acceptable market conduct will simply not be achieved without such regulation. This view supports the many respected views that have been expressed on the Productivity Commission's website.

Besides the consumer voice – there is the voice of those battling with market dominance, a volatile market and a climate of instability, uncertainty and change.

It is not only consumers who are at risk – the second-tier retailers have taken their share of pain and disappointed. In Jackgreen's 2007 Annual Report, Chairman John Smith has commented on gaming of wholesale prices (*see more detailed discussion and citation on pp 41-44*)

Chairman of Jackgreen John Smith says the company's 1997 Jackgreen Annual Report

"It's clear to Blind Freddy that {gaming} 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 plight of second-tier retailers also needs to be scrutinized more closely. The paucity of data obtainable by CRA International did not make it possible for a robust SWOT analysis of the market to be undertaken. CRA gracefully admitted to poor quality data that hampered their commissioned assessment of the Victorian retail market. This is discussed in some detail elsewhere (*see A Glimpse of the Micro and Macro Environment; pp 62; 86-105*)

Refer to 2007 Annual Report Jackgreen Pty Ltd - extract from Chairman's Report below (*further discussion pp41-44; 95;*)

"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)² paid \$105M for Powerdirect, the country's inaugural second tier retailer."

I have provided some pertinent data on wider issues of market structure, affiliation, ownership/cross-ownership; and conduct with passing comment on the belatedly published **CRA International Report on Impact of Prices and Profit Margins on Energy Retail Competition** in Victoria, which was not published 8 November 2007 a day before the deadline for submissions to the First Draft Report

(See detailed discussion of marketplace parameters, A Glimpse of the Micro and Macro Environment, and Price 106-122; and pp 62-105 ;).

² Ergon Energy is now owned by AGL, who is owned by Alinta, who is owned by the Singapore Power and Babcock and Brown Consortium

Retailers manage risk to the best of their ability to forecast this. Potential market participant newcomers may be excited by the concept of enhanced competitive opportunities the current a climate of major reform and change. Those who have been bitten already may not share the same optimism. Evidence of market failure is glaring.

I would like to publicly commend John Smith Chairman of Jackgreen, a second-tier retailer specializing exclusively in greenenergy, for the stance he has taken, for his quiet optimism tempered with reservations about how the regulatory changes are occurring and the vulnerabilities of the smaller businesses trying to maintain their position in a market dominated by relative giants, a climate of uncertainty and instability and massive apparently rushed regulatory reform and stakeholder consultation. *(see further discussion and citations p 41-44; 86-105)*

New licences to second-tier retailers are being issued at great pace. The fearlessness of newcomers is to be admired if not actually commended – but perhaps not without some reasonable caution that it is early days yet to make forecasts.

Larry Kauffmann, Pacific Economics Group of the Utility Regulator’s Forum has referred to “noise” interference,

“due to 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.”³

Amongst the performance indicators that can be used to aid in market power evaluations are

“company prices and profits, trends in a company’s total productivity (TFP) and the quality of regulated services provided to customers.”

There is resounding evidence of market volatility and of market failure – both for consumers and many of the newcomers to the energy marketplace. *(see discussion 59 Market Failure Factors pp11; 18-19;40-59; 86-105)*

Some new entrants have been forced into sacrificing a hard-earned residential clientele, either to a Retailer of Last Resort (RoLR) event in June, or to a distressed sale at a sacrificial price in July, leaving the market participants shell-shocked, or to take-over or consolidation. Some have turned to billing and other administrative activities instead of retailing energy. Possession of a licence does not necessarily signify active retailing. *(see further discussion– A Glimpse of the Micro and Macro Environment, p95 and 100; 86-105)*

The AEMC agenda is a busy one indeed. Even busier now at the end of 2007 that price deregulation is on the way; rule changes are happening faster than the speed of a lightening bolt; far-reaching regulatory change is well on the way; without, it would seem a comprehensive examination of the whole market, starting at the point where the price drivers belong and where “gaming” is known to be a threat to market success and stability.

³ Kauffman, Larry, “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.

In discussing better informed political decisions Ovretreit⁴ has noted, for example, the lack of prospective evaluation or of even small scale testing of internal market reforms in Sweden, Finland and the UK. Whilst he did not infer that all new policies should be evaluated or that the results of an evaluation should be the only basis on which politicians decide whether to start, expand or discontinue policies, just that politicians could sometimes save public money or put it to better use if they made more use of evaluation and of the “*evaluation attitude*.”⁵

Have load management factors been considered? ⁶ (*see pp 110-119*)

Has the issue of Metering Risks in a Gross Pool Market been considered?⁷ (*refer pp 110-119*)

What about wholesale impacts and distribution business behaviour? (*refer pp 112-118*)

Cross-ownership? (*Refer to A Glimpse at the Micro and Macro Environment pp 86-102*)

Market power and dominance? (*Refer to A Glimpse at the Micro and Macro Environment pp 62-105*)

External threats?

How were these identified and assessed by the AEMC?

Internal Market – Missing steps?

(Refer to pp 123-158 Some European models for completing those missing steps in the internal market – courtesy of Mark Jamison’s literature review 2005; and 108-119)

Obvious signs of significant market failure on both sides of the fence – for consumers and for second-tier retailers?

Is it enough to rely on perceptions; inadequate factual data; absence of strategic longitudinal studies of the market over a 5-6 year period; wishful thinking? (*Refer to discussion pp 108-119*)

As far back as June 2002, The Energy Action Group cautioned the ACCC on matters that would significant impact on energy reform over the next few years.⁸ Those cautions are discussed elsewhere with direct quotes from various submissions made.

Whilst it is clear the current review aims to examine the success or otherwise of retail competition in Victoria since FRC was introduced, without examining the range of factors impacting on cost control by retailers and consumers, and considering in detail the entire marketing distribution chain, a slanted and narrow view of competition factors will be gained.

Market dominance and market share imbalances must surely have some meaning and must surely inject some cautions.

There are no certainties. The volatile energy marketplace is changing daily. The parameters for gathering intelligence need to be made more sophisticated. Face value assumptions can mean compromised results, compromised evaluation and compromised productivity and consumer protection.

Has an accurate forecast been made of changing population trends, notably the ageing population? To what extent have external threats been evaluated, if at all? If evaluation has been undertaken, where can the data be found?

⁴ Ovretreit Evaluating Health Interventions, *Evaluation Purpose Theory* and perspectives Ch 2, p31

⁵ Ibid, Ovretreit Ch 2, p27

⁶ See analysis by John Dick President Energy Action Group pp 109-112 and European models discussed as a literature review undertaken by Jamison et al pp 123-158

⁷ John Dick Energy Action Group Powerpoint Presentation to Metering International Conference October 2007

⁸ Energy Action Group Submission to the ACCC SP/PowerNet Revenue Cap Association

John Dick, Energy Action Group in his opening philosophical overview of his presentation on Metering: Allocating Risks in a Cross Pool Market at a recent international conference on metering said:⁹

“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!”

In his concluding remarks John Dick said:

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 under pinning the market

A **“light-handed regulatory approach”** can lead to misuse of market power to the detriment of consumer welfare by one means or another, including diminishing the quality of service provided to customers, tantamount to price increase; or else impose trade measurement or other practices that are unacceptable; or else by deviation from agreed tariff parameters, increase by direct or indirect means, **“supply charges”** and other hidden costs that may incorporate both on-costs and other costs associated with the reading of either water meters to calculate gas or electricity consumption, as much as this represents appalling trade measurement practice; or bulk gas meters (if read at all) or both.

Certain unlicensed *“embedded network”* distributors are apparently being permitted to escape any and all regulation and undertake unacceptable market conduct because of significant weaknesses and loopholes in current legislation that appears to have had the effect of stripping end-consumers of their inherent rights and entitlements under existing provisions and under common law.¹⁰

It is not the prerogative of regulators and policy-makers to re-write contractual law, for instance. Yet this appears to have already occurred in the adoption of guidelines and codes governing energy-only contracts (bulk hot water charging and pricing arrangements) discussed in more detail elsewhere.

⁹ John Dick Energy Action Group Powerpoint Presentation to Metering International Conference October 2007: Metering: Allocating Risks in a Cross Pool Market

¹⁰ Refer for example to *“Embedded Networks – Disconnecting Customers”* Article in CUAC’s Spring Quarterly September 2005

Compliance enforcement is one of the major gaps in regulatory management practices currently under scrutiny, with the timing coinciding with the current AEMC Review of the Impact of Competition on the Efficacy and Efficiency of Gas and Electricity Markets, and with the Productivity Commission's Inquiry into Australia's Consumer Policy Framework. *(See discussion on pp 13-14, 58-59; 108-110; 159-161)*

Yet the AEMC chooses to see that retail competition has being effective because of "increased market activity" and interpretations of customer switching behaviour that may not hold up to scrutiny if more robust data could be obtained and in-depth analysis achieved to ascertain the issues that have lead to non-participation by consumers or dissonance. There is a dearth of convincing robust evidence, if any at all that is supportive of such an opinion.

CALC¹¹ has already put forward that:

"Competition policy is not an end of itself, but rather is one of several means to achieve market outcomes which satisfy consumer needs and are in the best interests of the community as a whole."

CUAC has observed that

*"Consumers' lack of understanding of the market and a concomitant lack of bargaining power continue to undermine effective competition"*¹²

Victorian consumer groups previously proposed that the Commission collect information of contractual conditions. I disagree with the opinion that protection regulation for vulnerable consumers that distorts economic efficiency may not be warranted. In some cases the social effects of market power go beyond those on economic distribution and efficiency (economics).

The data relied upon may not be as robust as one would hope. Predictions of switching behaviour based on that data and out of the context of robust behavioural economic theory and practice may not deliver all expectations.

In analyzing the consumer survey data relied upon, Gavin Dufty Manager Policy and Research at St Vincent de Paul and market performance measures says in his November submission to the current AEMC Retail Review: *(see further discussion and citation Market Failure Factors pp39-59, esp. 40-61).*

"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."

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On behalf of St Vincent de Paul Society, Gavin Dufty's November 2007 Submission to the AEMC Retail Review First Draft Report, has commented on the pitfalls of snapshot assessment of the market, and has urgent consideration of changing population trends. *(refer to pp to 106-110)*

Despite any interpretations made of the recent survey undertaken by Wallis Consulting that included **1000 Victorian consumers to test market awareness**; the Retailer Survey that provided

¹¹ AEMC Victorian Retail Competition Review Response to Issues Paper, Consumer Action Law Centre. 28 June 2007

¹² AEMC Retail Competition Review – CUAC Response to Issues Paper, 10 July 2007 p6

perceptions of retailers with scanty factual detail of market structure; recent turnover and market failure; and any other data relied upon. (refer to pp to 106-110)

CRA International was forced to rely on mostly historical data and web searchers. Retailers were not forthcoming in disclosure in order to assist with a more robust assessment of actual data so the CRA Report posted on the AEMC website on 8 November had no choice but to rely on wide margin estimates.

The issues of corporate social responsibility which has raised many community concerns, do not seem to have been addressed in the AEMC's assessment.

The Total Environment Centre (TEC) has suggested that¹³:

“The National Electricity Market's capacity to meet fundamental economic, social and environmental objectives is in question. This is because the NEM favours spiralling consumption and polluting fossil fuel electricity generation to the exclusion of energy savings and renewable energy.”

Gavin Duffy of St Vincent de Paul National Council has expressed concerns about a policy framework does not guarantee basic social and environmental protection¹⁴ (c/f TEC)

“It would be a fundamental failure if the policy framework does not guarantee basic social and environmental protection.”

There is cause for consternation indeed if there is validity concern expressed by Ric Brazzale, Director Business Council for Sustainable Energy (BCSE).¹⁵¹⁶

“energy market developments (may) occur in a manner that does not also support emission reductions”

In its May submission to the Victorian Department of Primary Industries, the BCSE through Director Ric Brazzale made a strong point about the dubious merit of restricting the issuing of VEET certifications to the residential sector and possibly small business thus missing.

“The huge opportunity of the broader commercial sector, which has similar potential for cost-effective greenhouse abatement from energy efficiency improvements via a tradeable certificates scheme such as VEET.”

The Total Environment Centre (TEC) had suggested that:

“The states and territories are now in the process of handing their environmental and social laws and regulations to the new national bodies that have no mandate to consider the impact of the NEM's greenhouse emissions or the protection of vulnerable consumers”¹⁷

In their **Power for the People Declaration** the TEC¹⁸ has made a number of concrete suggestions to call on MPs to amend the Australian Energy Market Agreement, which include the following:

¹³ c/f Total Environment Centre online Environmental and Social Objectives for the NEM

¹⁴ Ibid TEC as for 18

¹⁵ c/f Total Environment Centre 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

¹⁶ Business Council for Sustainable Energy Submission to Victorian Energy Efficiency Target Scheme, via Department of Primary Industries 18 May 2007, cover letter, p1

¹⁷ Total Environment Centre online Environmental and Social Objectives for the NEM available at <http://www.tec.org.au/index>.

¹⁸ Ibid TEC online Australia Dump Environmental and Social Goals in Power Shake Up

People Declaration calls on MPs to amend the Australian Energy Markets Agreement, the National Electricity Law and the National Gas Law by:

- * requiring regulators to consider the environment and sustainable development when making decisions
- * requiring regulators to consider social impacts, with particular reference to preventing negative impacts for low income and disadvantaged consumers
- * requiring the industry to implement cost effective demand management and energy efficiency to help consumers save energy wherever this is cheaper than investing in more infrastructure.

As cited in the Select Senate Committee's Report (2000), Ch 5 Socio-Economic Impacts of Competition¹⁹ (*see extensive further discussion Public Interest and Social Implications pp 162-221*)

"The ACF also made a number of concerns in relation to the restructuring of Victoria's energy sector:

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

Restructuring and sale of Victoria's generating, distribution and retailing networks for electricity was characterized by the following:

A broadscale write-off of historic debt, providing electricity with an uncompetitive edge over other competing forms of energy services (gas, solar, co-generation, demand management services, etc.)

Regions with high distribution costs (transmission costs) have been cross-subsidized (i. e. "equalised") by other regions via rural electricity subsidies. While energy subsidies may be appropriate in rural regions, the competitively neutral approach would be to subsidize generic energy expenditure, rather than providing electricity service providers with an unfair competitive edge. Hence specialist local power supply services, most of which involve reduced greenhouse emissions and lower unit distribution costs, are priced out of the market.

Dr. S. Dovers of the Australian National University is quoted as saying²⁰

"...there is simply the bothersome nature of change.....Most significantly of all is the fact that seriously pursuing sustainability will involve addressing deep, structural inconsistencies between human and natural systems. The problem attribute of systemic causes is a supremely difficult one: the roots of unsustainability are embedded firmly in our systems of production and consumption and patterns of governance and settlement."

Included in this submission is a discussion of Internal Market Analysis providing selected theory models as summarized by Jamison et al in a recent literature review. This might provide some insights into best practice parameters for completing the missing steps in the internal market. Refer to pages

Political agendas and complexity may mean that none of these issues will ever be addressed. The issues already raised and those in the melting pot in preparation cut across many jurisdictions, and

¹⁹ 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/nep_ctte/report/c05.doc

²⁰ Ibid Select Senate Committee Report 2000 Ch 5 web address as above under citation 22

cannot be addressed by any one agency, public Inquiry or Review. It is time to reconsider Rule Change Parameters, public interest and proactive solicitation of the voice of the people.

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

One interesting US example is the case of the Altria group, owner of the cigarette manufacturing firm Phillip Morris. The unexpected proposal was made by that group to allow the F.D.A. to regulate the manufacture and marketing of tobacco products. Such legislation is pending in the US.

Critics are saying that this is a bid by Phillip Morris to weaken opposition to cigarettes by working with the government, and could help the company maintain its market share.

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

Harmonization, consistency and clarity are warranted and welcomed. Correction of any looseness of wording in existing regulatory instruments, codes and guidelines is crucial to avoid compromised consumer protection and to avoid expensive complaints and litigation.

Consumer Action Law Centre (CUAC) has argued that retail price deregulation simply shifts the risk from retailers to consumers, the market participant most vulnerable to price shocks, as well as the supported view that new Government initiatives have resulted in an increase in consumer protection and a strengthening of the regulation relating to hardship customers. As such, **CUAC** has submitted there is no reason to believe that consumer protection and regulation cause a barrier to market entry.²¹

²¹ AEMC Retail Competition Review – CUAC Response to Issues Paper”

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 said²² (*see full text on pp 203-211*):

In all of these models the ESC²³ 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"²⁴. This residual market would be subsidized by the Government, supposedly using monies currently allocated to fund energy concessions designed to increase affordability of energy services for low income households.

As observed by Mr. Dufty, The model proposed

".....creates the opportunity for private companies to 'game'²⁵ the subsidies created to address market failure. This could occur through company's retreating from providing services to all but the most profitable customers.

The proposals made

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

The Australian Government needs to heed the voice of the people and the consumer agencies that represent them – not that they hear much from individual consumers such as me.

Lack of awareness of the processes available, tight deadlines, and the sheer power imbalance are daunting impediments in terms of the Government's accessibility to the consumer at individual level or vice versa.

Though largely focused on academic models of evaluation, the following section of this submission refers to consumer protection issues, market power imbalance; conduct issues, and the need for specialized segmentation with in-depth focus on particular groups. It also discusses some of the original goals of National Competition Policy and refers to the balance that in 2000 the Senate Select Committee tried to inject into competition policy philosophies that became distorted over time.

²² Dufty, G (2004). Who Makes Social Policy? – The rising influence of economic regulators and the decline of elected Governments. VCOS Congress Paper 2004

²² Powerpoint presentation World Forum on Energy regulation, Rome September 2003 "Are Universal Service Obligations Compatible with Effective Energy Retail Market Competition? John Tamblyn (then) Chairperson Essential Services Commission Victoria.

²³ Essential Services Commission, Review of the effectiveness of retail competition and the consumer safety net for electricity and gas, Issues paper, December 2003, p18

²⁴ 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.

²⁵ 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.

It is intended to provoke careful thought in undertaking further steps in the evaluative process and to encourage the most specialist input since it is no simple task to evaluate and make decisions about switching behaviour in a climate where genuine productivity, the fate of second-tier retailers and consumer protections are both in the balance.

Whilst I aim to undertake a more leisureed discussion for submission of specific discussion of selected issued for the consideration of the RPWG, I agree with the views of all the community organizations involved that:

*“Review timelines have to date provided little (or no) opportunity to collect information about contractual terms and conditions that may more clearly demonstrate anti-competitive behaviour.”*²⁶ This gap may well distort results.

Overall, insufficient time has been provided for community organizations and others to research and provided informed input and evidence to assist the Commission in its deliberations.

Consumer issues: *(refer also to pp 44-60; and 156-218)*

As an end-consumer, I can only endorse all that already been said on behalf of consumers by the CUAC²⁷ and others, including Energy Action Group in numerous submissions to many arenas, St Vincent de Paul Society Victoria; Victorian Council of Social Service; Alternative Technology Association; National Energy Consumers Roundtable, Tenants Union of Victoria²⁸, Vision Australia; Financial and Consumer Rights Council²⁹, Consumer Law Centre Victoria^{30,31}; Footscray Community Legal Centre and Essendon Community Legal Centre³² and other community organizations, about the risks of drawing hasty conclusions about consumer feedback; their understanding of the market and assessment of their best interests. The data cited by CUAC and others and their concerns as collectively expressed by them and other community organizations speak for themselves.

These community organizations have a philosophical commitment to consumer interests in the utilities area, albeit on a shoe-string budget which does not allow undertaking of individual advocacy. This is a huge gap in consumer protection.

It is important that any decision to deregulate is accompanied by appropriate protections for consumers; full disclosure when soliciting retailer switch; and most importantly enhanced protections and arrangements for those who are vulnerable and/or disadvantaged or otherwise marginalized on a number of counts, including health and financial parameters.

There is a dearth of consumer representation in all forums to discuss the future of the energy market and proposed regulatory changes. Due regard to a wide range of both energy-specific and other provisions needs reinforcement, including such provisions as tenancy, body corporate, trade measurement and utility law and intent; common law rights; natural and social justice rules and principles.

²⁶ AEMC Retail Competition Review – CUAC Response to Issues Paper” Ibid, p5

²⁷ AEMC Response to Draft Statement Joint Community Submission, CUAC, Victorian Council of Social Services, St Vincent de Paul, Alternative Energy Association 11 April 2007

²⁸ AMEC Review of Retail Competition, Tenants Union Victoria (TUV) July 2007

²⁹ Financial and Consumer Rights Council Report “Coercion, Cost and Confusion June 2007

³⁰ Consumer Law Centre Submission to Early Termination Compliance Review – Draft Decision 28 August 2006

³¹ AEMC Victorian Retail Review – Response to Issues Paper Consumer Action Law Centre (Gerard Brody, Senior Policy Officer)

³² AEMC Review of Retail Competition Response to Issues Paper, Footscray Legal Centre and Essendon Community Legal Centre 28 June 2007

Balance of power issues are of huge concern to the community. Reliance on self-regulation measures or more generic and expensive provisions such as under trade practice or fair trading provisions will be insufficient protection of consumers and will not necessarily improve competition, but may lead to further anti-competitive and predatory behaviour. Provision of energy is an essential service – it is not merely a commodity.

If market participants cannot develop enhanced social consciences whilst meeting productivity goals, they may need enhanced assistance through proper regulation, compliance enforcement.

Accountability, transparency and governance issues may be at stake. Compromised consumer confidence is compromised consumer protection.

Though national consistency of consumer protection mechanisms may not be within the scope of the current **Review of the Impact of Competition on the Gas and Electricity Retail Markets (2007 onwards)**, it is of some concern that serious consideration may be given to lightening regulatory control in efforts to improve competition.

Perhaps the **Productivity Commission** and the **Ministerial Council on Energy** through its **Retail Policy Working Group** can address a proportion of the wide issues that will be raised.

Existing energy-specific complaints mechanisms and other recourses appear to be falling short of consumer expectation. Besides that the complaints scheme appears to be not only unacceptably limited in its powers and jurisdiction, but undertakes no advocacy at all or referral for either advocacy or enforcement. It is a scheme funded, run and managed by market participations with a Constitution Board exclusively comprising market participants. Perceptions of conflict of interest in the minds of the public are issues that need to be considered in the light of the provisions of s36 2(c) of the *Gas Industry Act 2001*.

Funding for research and advocacy is minimal and therefore consumer protections cannot be addressed.

Reservations about generic protections have already been eloquently expressed in Productivity Commission submissions, notably those of Dr. Michelle Sharpe, Dr. Carol O'Donnell, Hank Spier, Lyndon Grigg to name a few.

These protections have never been more compromised in the energy market than they are at present at a time of significant change and consideration of deregulation and lightening of the **“regulatory burden”**. When will these be restored? Who will engage in addressing the enormous range of unattended issues in the public interest?

The timelines are too tight for Inquiries and Reviews. Informed decisions are required but may not be obtained because of that.

I am concerned to note EAG's view³³ that

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

This body has suggested that:

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

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

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

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

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

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

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

I have already more than once suggested in writing to various state and federal bodies the possibility of a judicial review to request setting down of certain regulatory provisions that appear to be unfair and unjust to consumers and appear to have been formulated without due regard to the requirement to uphold legislative provisions across the board in all jurisdictions where there may be overlap, unless explicitly cross-referenced between legislative provisions allowing one enactment to over-ride the other.

³³ EAG's Initiation Submission on National Electricity Law and National Electricity Rules 5 January 2006 to Department of Industry, Tourism and Resources (Cwlth), (DITR) Energy Market Reform Team, National Energy Market Branch

The bulk hot water pricing and charging arrangements mentioned in previous submissions and again in this one may represent a good example of things gone wrong with the drafting of legislation codes and guidelines where the intent of Parliament with respect to deemed contract for example, or Orders and other provisions referring to “**relevant customer.**”

The utopian view of accessibility to a judicial review in plans for energy reform, seeking the power of an appropriate court to review a law or an official act of a government employee or agent for constitutionality or (if applicable), for the violation of basic principles of justice, may indeed be too utopian if EAR’s misgivings are correct.

In theory such a review would enable a court who has the power to strike down that law, to overturn that official act, or order a public official to act in a certain manner, if the court believes the law or act to be unconstitutional or (in some jurisdictions) believes the law or act to be contrary to law in a free and democratic society).

EAR’s suggestion for an independent merits review may well indeed provide better outcomes and provide scrutiny on poor regulatory decisions. Most consumers would need active assistance with such a process, and the question of funding and responsibility would need to be carefully considered if such an option became a reality.

To take somewhat out of context the words of David Russell QC³⁴, when referring to **Essential Services Legislation** as “*Magic Pudding or Boarding School Blancmange.*”

“The Victorian Opposition has foreshadowed revamping of, and increased reliance upon the State’s Essential Services Act 2001 should it win the next election. The desirability or otherwise of essential services legislative reform will continue to agitate the minds of our politicians for some time to come.”

Meanwhile, on a lighter note, but still serious, we note the quotes cited by David Russell QC in another context but still referring to essential services legislation:

“Don’ t look at me,’ snapped Wesley Mouch. ‘I can’t help it. I can’t help it if people refuse to co-operate. I’m tied. I need wider powers.’”³⁵

We should be careful to entrust those powers wisely and to uphold always the principles of fairness, equity, justice, transparency and accountability in all provisions impacting on the general public. How else can consumer protections be maintained? Again, compromised consumer confidence is compromised consumer protection.

It would be hard to envisage powers like these operating other than in wartime. They include the power to direct work to be done, to call in strike-breakers, to prohibit the use of consumption of the service and to requisition property. These executive acts would be virtually impossible to challenge in the courts.

In referring to Essential Services Legislation, but in the context of industrial relations The President of the Council for Civil Liberties, Queensland, said:

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

³⁴ David Russell QC, “Essential Services Legislation Magic Pudding or Boarding School Blancmange.”

³⁵ *Rand:Atlas Shrugged (1957) Random House, New York p.500, c/f Russell D, QC, “Magic Pudding or Boarding School Blancmange”*

In 1979 Peter Applegarth, then Executive Member of the Queensland Council for Civil Liberties said, perhaps rather unkindly, but still related to Essential Services legislation.

“The Government’s actions are motivated by fear.

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

Two hundred years ago Thomas Paine said:

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

Now in the year 2007, Government initiatives are seeking to receive input from stakeholders adversely affected by regulations as evidenced by the philosophies embraced by the Productivity Commission’s Inquiry in Australia’s Consumer Policy Framework.

There is a dearth of consumer input into enquiries such as this. I would like to be included on the list of stakeholders with a passion to see justice principles upheld and true productivity in operation.

Finally, I would like to openly express my empathy for the **second-tier retailers** wishing to keep up with the pressures of an uncertain regulatory and economic climate, rapid change and macro-environmental threats. They deserve to be supported whilst they take risks that may be hard to assess in competition against the giants who are already established.

There are many impediments to such a Utopian goal, but one can always dream.

Does the rest of the community share the optimism of the AEMC and opinion of retail competition success in the years since full retail contestability was introduced?

FURTHER COMMENT ON MEANINGFUL STAKEHOLDER CONSULTATIVE PROCESS

I repeat my view from my preliminary submission of 9 October that in general the notice time given for a huge number of submissions associated with energy reform, review and transitory arrangements has been so unrealistic as to have a measurable impact on stakeholder morale and willingness to participate.

For example on 15 October the MCE published an invitation for submissions to the **Release of a Regulatory Impact Statement (RIS) on the Separation of Generation and Transmission**. The deadline of 9 November coincided with the deadline as for Response to the AEMC Retail Competition Review First Draft, for which barely five weeks had been provided to read in excess of 600 pages of protocol and commissioned report material plus considerable other background material and data dating back several years in order to gain a picture of retail competition impacts over time, rather than just as part of a snap shot exercise.

I have not had the opportunity to study requirements and background of that RIS, but my immediate first response is that if stakeholders who are potentially interested in active participation with this and other invitations for public involvement in the consultative process, the barrier of greatest significance is the unrealistic consultative timeframe for everything happening in energy reform and poor or untimely access to protocols and related documentation, whether or not commissioned for the purpose

Whilst I am aware of the COAG deadlines, it would seem that the whole process of consultation has been commenced far too late. Effective consultation is blocked, if reports that the public relies on to read and respond to are published a matter of weeks before response is required; and if any one MCE or AEMC Team involved expects to study all that documentation first, instead of making commissioned reports and other material readily available simultaneously to all stakeholders, with ready links to other material relied upon in a timely way.

It is not that consultation is not taking place; it is a question of how meaningful that consultation is. The point here is that demand side material provided in a timely way and all other material pertinent to deliberations by stakeholders needs to be commissioned and published in such a way as to allow ample lead time final deadlines.

The way things currently work is that an unrealistic timetable is formulated, AEMC personnel and others access commissioned or other data when available but do not offer the same length of time to stakeholders to make their own deliberations based on a complete assessment of the facts. Nor have they been assisted with the process with ready links and notifications of available material.

In principle I believe that all parties should have access to documentation submitted, commissioned or related. This can readily be achieved by sending a Webalert and link at least to all those registered for a WebIndustry link. It will not address the needs of those without Internet connections of computer literacy, but would be a start.

This approach was demonstrated for the first time when an MCE Internet Update updated on 20 October 2007 provided links to additions to the website so that these could be accessed by interested parties immediately upon receiving the alert.³⁶

³⁶ MCE Regulatory Impact Statement. Found at http://www.mce.gov.au/assets/documents/mceinternet/Regulatory_Impact_Statement20071015121839.pdf

One example is the AER State of the Energy Market Report of 320 pages, published well after the Issues Paper deadline to be of any real value to stakeholders. The existence of this document was not generally known to the public in any case, despite being ostensibly written as an exercise in transparency.

Another example is the **CRA International Price and Profit Margin Report commissioned for the AEMC dated 8 November 2007** and posted on the website a day before the deadline for response to the AEMC First Draft Report on Retail Competition, even then without electronic notification to stakeholders with a pre-registered interest, whether organizations or individuals.

The Wallis Consulting Consumer Survey was available for the 4 and 5 September Victorian public hearings and should have been published prior to the hearings, just as soon as available. If delays were anticipated, the consultation process timetable should have allowed for this to provide all stakeholders with ample opportunity to read digest and respond to everything available including cross-reading of submissions to inter-related arenas.

Links to all relevant material to all arenas would assist in robust consultation goals.

Lack of meaningful consultation

The EAG has expressed

“.....outrage about the timeframes for, and timing of, public/stakeholder consultation. EAG believe there are major issues of substance and not just process that need to be addressed in the new NEL/NERs. We strongly recommend that more work and public discussion needs to occur before they are finalized and enacted. The holiday months of December and January (for most of government and industry) are not the time to be ‘tackling’ these crucial reforms.

EAG is distressed to see that the current draft NEL/NER legislation fails to address several significant issues like Merits Review in the package. THE SCO has failed to show why we only have the current incomplete package when with some more time (at least 6 months) we could have a complete reform package. At this stage there is an implicit “Trust Us Approach” EAG doesn’t!

As governments appreciate, electricity markets and associated infrastructure provide essential services to the community. EAG believes that Ministers are rather sensitive to energy price increases and major outages. These essential services have to date been provided by the National Electricity Market (NEM) which was developed over 3 years from 1995 to 1998 with the benefit of considerable consultation with industry. It is alarming that governments now seek to change the institutional and governance arrangements of the NEM without the benefit of the considered views of industry, major users and consumers.”

[Gavin Dufty’s](#) (Nov 2007) submission on behalf of St Vincent de Paul Society to the AEMC First Draft Report has expressed grave concerns about the process of release of the draft report in a timely way at the time that the media were provided with a copy. To allow for proper consultation all stakeholders who have lodged an interest or who have been part of the consultative dialogue should be provided with a timely personalised electronic copy of public release protocols, as has been suggested by Mr. Dufty.

Mr. Dufty has gone as far as to suggest that

“failure to follow such a process only serves to undermine the independence of the AEMC and could be interpreted as a strategy to exclude or limit debate on these important matters.”

That is exactly the impression I had gained from the outset when I discussed with AEMC staff my wish to raise unpopular topics that were of crucial concern to the Review in terms of highlighting market conduct and market failure narrowly focused on a certain sub-segment of the consuming public.

Perhaps we all need to purchase a copy of *“How to Silence the Dissenters.”* There are many subtle ways of conveying this impression, and the AEMC needs to be aware of the need to make sure that opinions and input from all stakeholders are not hampered by either attitudes or approaches in delivering full and timely access to public protocols as well as at least links to all data relied upon even if not specifically commissioned by the AEMC.

In the desire to achieve robust input so that an objective decision can be made, the process of consultative dialogue needs to be seen to be proactively cooperative, timely and transparent.

As far back as 2005, in their submission to the National Energy Market Branch of the Department of Industry, Tourism and Resources, the **Energy Action Group (EAG)**³⁷ has observed that:

“Prudent regulatory and parliamentary practice requires either adequate time for affected parties to fully assess and consider proposed regulatory amendments.”

Alternatively **EAG** suggested that:

“Regulatory impact statements” (RIS) be made available to assist affected parties quickly to understand the effects of the proposed changes.”

Though willing to make prolific and considered oral and written submissions from end-consumer standpoints, I have not found it particularly easy to manoeuvre my way through the jungle of government agencies in order to locate the appropriate arenas in which to voice my concerns or make e-mailed submissions.

There are a number of reports that have not been published, including Part 2 of the **NERA Consulting Report (Demand Side)**³⁸ to which some market participants had objected.

Some of these were referred to in the submission to the MCE’s Market Reform Team dated May 2007 from Energy Response, an Australian company describing itself online as

*“Providing important and innovative Demand Side initiatives for participants in the national electricity industry.”*³⁹

On the issue of demand side initiatives, I intend to discuss briefly – yet again, concerns about the plight of residential end-consumers.

³⁷ Submission to Department of Industry Tourism and Resources “EAR Initial Submission on National Electricity Law and National Electricity Rules” 5 January 2005

³⁸ . NERA Consulting Report Demand Side Response and Distributed Generation Case Studies, NERA Economic Consulting April 2007 apparently prepared for the Network Policy Working Group and the MCE as part of its review of the National Electricity Rules. Found at: <http://www.energyresponse.com/?pageid=109>

³⁹

These concerns relate not only those referred to as “**embedded network consumers**” in the strict sense of the use of that term. In its common application the term embedded network generally means supply obtained from a network other than the original distribution network and on-sold often by unlicensed distributors who have obtained exemptions and therefore escape regulatory control over their practices; but also to all other types of “*inset consumers*” including those receiving energy-only used to heat communal bulk hot water services in multi-tenanted dwellings, inappropriately and unilaterally deemed to be contractually obligated on “*energy-only contracts*” apparently without due regard to the fundamentals of contractual law or unfair trade practices or proper trade measurement practices.

Those living in caravan parks, rooming and boarding houses and nursing homes and poor quality apartment blocks served by communal energy meters and centrally heated water for hot water services are amongst those not receiving their proper entitlements and disadvantaged by existing provisions and practices. These are bound to be amongst those where market failure has been demonstrated.

In order to provide a discrete section of particular interest to the Productivity Commission, the section below is also repeated on pages 162-224, *The Public Interest Test and its Role in the Competition Process*.

Given that this submission is intended for several parties, including that AEMC, I include here material that may help to remind the AEMC of the recommendations of the Senate Select Committee (SSC) in 2000⁴⁰ in discussing National Competition Policy intentions and goals, which includes effective and timely stakeholder consultation and parameters that extend beyond commercial gain.

With those reservations in mind it is important to re-emphasize that sufficient lead time is allowed to plan for the price and social impacts that will leave possibly half the population at risk of shell-shock and disadvantage when price deregulation becomes a reality. That may be a growing proportion as the population ages.

The SSC had received many submissions and other evidence on these issues in particular:

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

⁴⁰ Ibid Senate Select Committee 2000 as for citations 22 and 23, Ch 5

In Chapter 4⁴¹ of its 2000 Senate Select Committee Report reference was made to a recurring theme identified in the interim report. These related to difficulties in the way in which National Competition Policy had been implemented.

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

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

The Committee's reservations were confirmed by the responses received to the Interim Report. The SSC formed the view that failure to properly explain the NCP had contributed to these serious problems. Policy and rule-makers need to make sure that the policies proposed are not only well understood by stakeholders but by themselves, with a thorough understanding guaranteed for those directly affected, or the broader public. This cannot be achieved without effective communication, timely provision of all protocols and documentation relied upon, and meaningful and timely stakeholder dialogue. That dialogue should be ongoing, and open. It should not be restricted to chance availability to respond to numerous consultation initiatives with overlapping deadlines.

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

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

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

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

We bear in mind that (in the language of economics today) efficiency is a concept that is taken to encompass ‘progress’ and that commonly efficiency is said to encompass allocate efficiency, production efficiency and dynamic efficiency.⁴²”

⁴¹ “Riding the Wave of Change, A Report of the Senate Select Committee on the Socio-Economic Consequences of the National Competition Policy Committee 2000 Chapter 4, The Public Interest Test and its Role in the Competition Process

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

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 SSR Report of 2000

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

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

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

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

Mr. Waller advised the Committee that:

In summary, it is a difficult area. There are problems of methodology, there are problems about the practical application of the policy. Underlying all this, I would say that I think that, in net benefit terms, the national competition policy arrangements are of major value to Australia in meeting the problems it faces globally.⁴³

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

⁴³ Mr M Waller, Committee Hansard, 1 November 1999, p 841

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

Mr RITCHIE—My assumption is that obviously we support some of the initial gains that have been made under national competition policy, but in areas such as infrastructure, NFF is starting to have some real, serious concerns. The picture that Rod Nettle painted about what is going to happen to rural and regional Australia is not a difficult picture for us to extrapolate to, either. If you apply a strict principle of user pays to the provision of infrastructure, then you are not going to have a rural and regional Australia to worry about in 25 to 50 years because nobody out there can afford to pay.

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

The documents that would benefit from analysis by those better qualified than I am include the following:

1. Part One: Distribution Rules Review Network Incentives for Demand Side Response and Distributed Generation, NERA Economic Consulting, April 2007.
2. Part Two: Demand Side Response and Distributed Generation Case Studies, NERA Economic Consulting, April 2007, apparently prepared for the Network Policy Working Group and the MCE as part of its review of the National Electricity Rules.

In correspondence with the AEMC Team I had suggested it may be a good idea to have this either available on site or else linked. This was under consideration but the notion of cross-linking this important document to the retail review must have been rejected.

3. CRA International Final Report Impact of Prices and Profit Margins on Energy Retail Competition in Victoria posted 8 November 2007 on AEMC Retail Competition site.

In the section analyzing briefly data quality and evaluative processes later in this document, I will repeat the reference in a slightly more detailed reference to data parameters relied upon by the AEMC to support the claim that retail competition has been successful and secondly that removal of the standing offers and protections is justified.

4. Regulatory Impact Statement on the Separation of Generation and Transmission.

The timing of this has been so badly planned to allow for all relevant reports to be taken into account in the stakeholder consultation plan as to make it impossible to take seriously the intent of the AEMC to allow for effective participation.

Consistent with the goals of National Competition Policy, the Senate Select Committee's recommendations were that at least four weeks be given to all stakeholders to study protocols.⁴⁴

⁴⁴ Riding the Waves of Change” A Report of the Senate Select Committee Ch 6 The Public Interest Test the Socio-economic consequences of national competition policy. 2000 found at http://www.aph.gov.au/Senate/Committee/ncp_ctte/report/c06.doc. see also Ch 5 the Socio-economic consequences of national competition policy

Besides those protocols and reports listed above there are numerous protocols and submissions sent to other arenas during the past several weeks and months and previously to state and federal consultations, enquiries and reviews, too many to mention, that should have been linked to this Review and made accessible through convenient weblinks on the AEMC site for ease of reference for those who wanted to take a more comprehensive view of opinions facts and inter-connected issues relevant to appropriate assessment of the market. The same principle applies to other arenas – cross-referencing and considering all relevant data whatever the purpose that data was originally commissioned or responded to.

It is entirely impossible to consider retail competition issues out of context and reports such as these are crucial to the understanding of the market.

Some of the reports mentioned were not made available at the public meetings on 4 and 5 December in Victoria, nor was the Wallis Retailer Survey discussed or even mentioned, though the report does provide was revealing insights. It seems that the Retailer Survey was not available till October, a month after the public meetings so too late for the public to be adequately informed at those meetings or in time in any case to study and respond within the five weeks provided from the time of publishing the First Draft Report.

It would seem reasonable to expect timetabling to be organized in such a way that availability of reports would precede public meetings and in any case would be made available with ample lead time for response.

Amongst other relevant submissions is Energy Action Group's Response's submission of 30 June 2006 to the Reliability Panel (AEMC). I quote below from a document that I have only just accessed from Energy Action Group's submission to the AEMC Reliability Panel Comprehensive Reliability Review Response to Interim Report March 2007.⁴⁵

"Since its inception the market has worked effectively and generally served 19 million Australians well. However, future challenges such as periods of sustained drought, climate change, rapid growth in peak demand, investment uncertainties and consumers expectations could undermine the market's reliability reputation unless some systemic changes are made in the near future."

"One critical aspect that the market still glaringly lacks is active participation or response by end users. As was recently stated at one of our public forums 'the NEM operates like the sound of one hand clapping'. This highlights the supply side domination and the negligible participation by end users even after nearly 9 years of market operation."

There is the *State of the Energy Market 2007* volume which went to press in July and reached me about a week ago upon request after a considerable wait. I do not understand why NERA reports were undertaken when this document had already been written for AER (320) pages.

My limited research of market parameters provides in this submission more detail on aspects vertical and horizontal integration and of mergers and acquisitions.

⁴⁵ AEMC Reliability Panel Comprehensive Reliability Review Response to Interim Report March 2007 Energy Action Group Response found at <http://www.aemc.gov.au/pdfs/reviews/Comprehensive%20Reliability%20Review/submissions2/009%20Energy%20response.pdf>

I came across the submission that CUAC made in 2006 to the MCE SCO concerning the poor attitude to consumer consultation and refusal to extend deadlines. In further support of the concerns that I have already expressed about the consultative process and issues of accountability, transparency I refer to the very same concerns raised by CUAC in their submission to the MCE SCO in January 2006⁴⁶ The Submission was made by CUAC as a comment on the paper “*Public Consultation on a National Framework for electricity and gas distribution and retail regulation* (the Paper)⁴⁷,

In the opening comments CUAC has mentioned that this body was established

“to ensure the interests of the interests of Victorian electricity, gas and water consumers, particularly low-income, disadvantaged and rural consumers, are effectively represented in the policy and regulatory debate.”

Apparently CUAC had sought an extension of a mere

“two additional weeks to the 24 community and consumer groups representing the main consumer organizations working on NEM issues on behalf of residential and low-income consumers – a key group of stakeholders.”

It is my understanding CUAC that interpreted refusal of a simple reasonable request as evidence to support concerns about

“the value that the SCO accords to consumer input, as well as displaying a poor understanding of the resources available to consumer organizations.”

Finally, I note that CUAC raised concerns about the lack of any research or data to justify a result that would significantly weaken the Victorian regulatory framework.

It was CUAC’s view that the Paper should have stated that:

“the intention behind a regulatory structure is to ensure that consumers benefit from competition and that their interests are protected in the long run.”

The paper includes valid comments about accountability and the need to achieve proper consultation and:

“the need for jurisdictions to retain jurisdictions must retain the capacity to achieve social and environmental policy objectives.”

I had not read the submission at the time of completing and forwarding my revised submission dated 9 October also touching upon consultation; accountability and transparency issues; besides issues of evaluative process and balanced assessment of facts in determining Australia’s readiness for completion of FRC by including price deregulation and lightening of the regulatory burden to such an extent as to represent significant consumer detriment.

⁴⁶ Consumer Utilities Advocacy Centre Ltd to the Ministerial Council on Energy Standing Committee of Officials Public Consultation on a National Framework for Energy Distribution and Retail Regulation dated January 2006 found at <http://www.mce.gov.au/assets/documents/mceinternet/ConsumerUtilitiesAdvocacyCentre20060116121912.pdf>

⁴⁷ CUAC comment on “*Public Consultation on a National Framework for electricity and gas distribution and retail regulation* prepared by Gilbert + Tobin and NERA Consulting for the Ministerial Council on Energy (MCE) Standing Committee of Officials (SCO)

EVALUATIVE DESIGN ISSUES AND INTERPRETATION OF DATA

Before dissecting the findings of recent surveys commissioned by the AEMC and providing feedback I would like to raise some general evaluative process considerations based on theory models in best practice.

Perhaps the AEMC and/or Productivity Commission will consider seeking specialist evaluation input with further evaluation of data, or perhaps consider costing out the options. Just a suggestion.

These are not intended as vexatious challenges but merely to point out that the enormity of the task and the implications of making decisions about deregulation and future policy are such that rushed timelines and careful informed consideration in the public interest.

Whilst sample size is important, and whilst the public will recognize that a randomized sample of **1000 consumers** is a reasonable sample size; quality of data, especially with regard to depth, appropriate sub-segmentation to target particular groups that may be affected differently by market impacts and competition or anti-competition outcomes, are also important factors that time and opportunity may not have afforded in the sample obtained.

The data produced by Wallis Consulting as commissioned by the AEMC yielded quantitative but not qualitative randomized sampling of 1000 consumers, addressing the standard range of demographics. The data relied upon appears not to provide enough substance on which to make predictions about switching behaviour.

However, there was no qualitative assessment, particularly with regard to market performance for well over 50% of the Victorian energy market consumer population who had not actively participated; the nature of the issues impacting on those groups or whether regional, rural, low volume customers; the renting population, and those financial vulnerable had been unable to effectively participate for reasons other than the assumed indifference.. The assumptions appear not to be spelled out. There seems to be a lack of depth in the sampling methodology; and importantly, lack of appropriate sub-segmentation to target particular groups that may be affected differently by market impacts and competition or anti-competition outcomes. Consumer groups with more expertise have already expressed these reservations.⁴⁸⁴⁹

A SWOT analysis in the case of the energy industry is a highly specialized exercise, especially in an immature market – see comments by CUAC and others. Such data as has been gathered, especially for the CRA International report published at the last minute on 8 November with a response due date to the AEMC Report of 9 November acknowledges the poor quality and rather old data that was relied upon apart from public domain published tariffs and the like. The weaknesses of the Wallis surveys have already been mentioned above.

Prior to undertaking the Wallis survey to ascertain market awareness and switching conduct, what steps were taken to mount a strengths and weakness analysis (SWOT).

If undertaken, where can the results be located? This type of exercise is normally undertaken prior to the gathering of data so that the survey data is meaningful, is robust to address a range of relevant factors; and not simply narrowly focused on data-gathering that may yield compromised results if the goals and parameters that could have been initially identified in a SWOT analysis were not clearly identified and addressed in the study design.

⁴⁸ Submission “AEMC Retail Competition Review – CUAC Response to Issues Paper” 10 July 2007, Key issues

⁴⁹ Submission CUAC

I was concerned to hear that notwithstanding the large quantitative sampling survey undertaken by Wallis Consulting focused consumer switching behaviour has not been followed up with more in-depth and longitudinal studies or plans for such as part of the challenging evaluative process ahead.

I can only reiterate what CUAC has already implied – take care with this process make sure that the data gathered and evaluative processes followed are thoroughly addressed with due regard to best practice evaluative process.

Emphasis that has been placed by various bodies, including the National Consumers Roundtable on Energy as:

“An informal coalition of advocates for energy consumers” with a predominant interest in “households and small business on electricity” as a service that should be regarded as “an essential service, on par with water supply and emergency services such as police and ambulance.”⁵⁰

For the segment of the community, which constitutes private residential tenants without choices, if the only supply for domestic cooking and heating use is gas, or for bulk hot water service provision gas should be seen as much an essential commodity as electricity. This is a market segment that has a “gas only” fuel choice. Having said that many of the arguments presented here also relate to customers of electricity.

In its September 2006 submission to the Ministerial Council on Energy’s Standing Committee of Officials, the Consumer Utilities Advocacy Centre Consumer Law Centre Victoria (CALV)⁵¹ referred to the importance of assessing **sub-markets**, especially those who were isolated or **vulnerable or residential tenants**.

The recent survey design and proposed evaluative processes appear to have been far less robust that required for the purpose of evaluating the success of competition.

The presentation in Melbourne on 4 September by the **AEMEC Retail Review Commission Panel** did not specify the evaluative design opted for and the basis for this or choice of data-gathering approach and tools, but reported some of the results obtained. Having briefly read the Wallis reports, I have some further random burning questions provided below.

It is not a trivial question whether pre-determined bias as to outcomes may skew results or whether objective buffers are required to ensure that the right decisions are made – in the public interest.

The section below is intended as a food-for-thought teaser. There are many respected experts who could offer credible and informed insights into the evaluative process being undertaken. Their inputs may be invaluable. Expert advice on how to evaluate an action research project aimed at understanding how to construct better relationships between economic development practice at the community level and economic develop policy cannot go astray.

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

⁵⁰ Appendix to Response dated 11 April 2007 to Draft AEMC Statement from Community group Collective, including CUAC

⁵¹ Consumer Action Law Centre Victoria Submission to AEMC September 2006

Since retailers manage risk more than they set prices, it is impossible to adequately understand the retail market without a through knowledge of the whole distribution chain starting with the wholesale market and load management.

The AEMC has apparently relied on reports that were partly prepared for the ESC and built on to proffer data mainly focused on switching behaviour of Victorian consumers. There was a dearth of material available to CRA International, who relied on poor quality data, web-based information published tariffs and old data dating back to 2003 upon which to make their predictions, with acknowledgement of the significant limitations of being unable to access more robust data.

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

Here's a quote for day directly from Michael Quinn Patton⁵²⁵³ for all those considering policy changes in the energy industry (or any other industry) that may impact on balance of power impacts.

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

SOME BURNING EVALUATION QUESTIONS

- What was the evaluand *{Funnell and Lenne 1989}* at several levels, mega, macro and micro, since different stakeholders will have different concerns at each of these levels *{Owen (1999:27)}*.
- In choosing design and methods, were any used cautions against replacing indifference about effectiveness with a dogmatic and narrow view of evidence *{Ovretveit, 1998:}*.
- What external threats were identified and considered before the data gathering exercise was undertaken?
- What comparisons were used?
- What were the boundaries and objectives?
- Was an evaluability assessment undertaken to more precisely determine the objectives of the intervention, the different possible ways in which the item could be evaluated and the cost and benefits of different evaluation designs⁵⁴
- What were the implied or explicit criteria used to judge the value of the intervention?
- Which evaluation design was employed was employed, since a decision on this issue would impact on the data-gathering measures?

⁵² Patton, M. Q. (2002) *Qualitative Research and Evaluation Methods*, Sage Publications, p 276.

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

⁵³ Michael Quinn Patton lives in Minnesota, where for 18 years he was Director of the Minnesota Center for Social Research; former President of the American Evaluation Association and the only recipient of both the Alva and Gunner Myrdal Award for Outstanding Contributions to useful and Practical Evaluation from the Evaluation Research Society and the Paul F Lazarsfeld Award for Lifelong Contributions to Evaluation Theory from the AEA. In 2001 the Society for Applied Sociology awarded him the Lester F Award for Outstanding Contributions to Applied Sociology

⁵⁴ Wholly (1977) *Evaluability assessment in* L Rutman (ed.) *Evaluation research Methods: A Basic Guide*, Beverly Hills, CA: Sage

Wholey JK (1983), *Evaluation and Effective Public Management*, Boston: Little, Brown c/f Ovretveit *Evaluating Health Interventions*. Open University Press. McGraw-Hill (reprinted 2005), Ch 2 p 41

- Was the evaluative design in this case case-control, formative, summative, a combination of process (formative) and summative; cost-utility or audit? Will assessment of the data gathered be contracted out to an informed researcher or research team with recent professional development updates and grasp of the extraordinary complexities in the evaluative process?⁵⁵
- How was the needs assessment conceptualized?
- Was the program design clarifiable?
- How was the formative evaluation undertaken?
- What are or were the Program Implementation process evaluation parameters?
- What measures will be in place for evaluating the “settled program” (or policy change proposed)?
- How were short term impacts by conceptualized and identified for the proposed changes?
- What definitive outcomes are sought and how will these outcomes be determined by follow-up?
- Was/will there be time to activate the evaluation’s theory of action by conceptualizing the causal linkages?⁵⁶ Whilst not ideal, if no theory of action was formulated, perhaps it is not too late to partially form a theory of action plan.
- Was there be room or time in the data-gathering exercise to probe deeper into the answers provided by the people whose lives will be affected by any decision the Government may make to deregulate within the energy industry? The skilled questioner knows how to enter another’s experience?⁵⁷
- As Eyler (1979) said *What are figures worth if they do no good to men’s bodies or souls?*⁵⁸
- What was be done do assess the intended impacts of the studies undertaken.
- Before the data-gathering exercise was undertaken, and considering the time constraints were these factors considered: feasibility, predictive value; simulations; front-end; evaluability assessment?
- What processes were undertaken to ensure added-value components to the evaluation?
- How will the AEMC and Productivity Commissions utilize case study example in augmenting the existing relatively generic study undertaken addressing standard demographics over a large sample without sub-segmentation of more vulnerable groups (such as residential tenants or regional consumers) with more in-depth evaluation?

⁵⁵ Patton, M. Q. (2002) *Qualitative Research & Evaluation Methods* Sage Publications

⁵⁶ Patton, M. E. *The Program’s Theory of Action, “Utilization Focussed Evaluation*, Sage, Thousand Oaks, 1997, pp 215-238

⁵⁷ From Halcom’s *Epistemological Parables* c/f *ibid* *Qualitative Research and Evaluation Methods*, Ch 7 *Qualitative Interviewing*

⁵⁸ c/f Ovretveit (1997) *Evaluating Health Interventions*. Open Univ Press. McGraw-Hill (reprinted 2005), Ch 1

- How carefully will the AEMC and Productivity Commissions in their parallel Review/Inquiry review in tandem program documentation, especially where there is overlap; or examine complaints and incident databases; form a linkage unit for common issues.
- To what extent will the evaluative process undertaken⁵⁹ by both bodies be the following?
 - Strongly conceptualized
 - Descriptive
 - Comparative
 - Constructively skeptical
 - Positioned from the bottom up
 - Collaborative
- Does the AEMC, MCE or Productivity Commission have a plan by which program analysis can be undertaken formally, and by which success criteria can be measured as the desired features of the outcomes represented in the outcomes hierarchy, defining more precisely the nature of the outcomes sought and the link between the stated outcome and the performance measures for that outcome in terms of both quantity and quality?”⁶⁰
- How will the success of the policy changes ultimately effected by monitored and re-evaluated and how often. Specifically, will there be a second phase of evaluation as one of accountability to managers, administrators, politicians and the people of Australia?
- What will be the rule change policy that will be transparent and accountable not only internally but to the general public as stakeholders?
- Generic protections such as those afforded by trade practices and fair trading provisions are currently insufficient and not quite as accessible as is often purported.
- Within an industry that represents an essential service and where large numbers of vulnerable and disadvantaged consumers (not just on financial grounds) are under-represented how will the Government ensure that the rights of specific stakeholder groups are not further compromised?
- How accessible will Rule Changing be?
- How will the success of the policy changes ultimately effected by monitored and re-evaluated and how often. Specifically, will there be a second phase of evaluation as one of accountability to managers, administrators, politicians and the people of Australia?
- In choosing design and methods, what will be done about replacing indifference about effectiveness with a dogmatic and narrow view of evidence *{Ovretveit, 1998:}*.
- What will be the rule change policy that will be transparent and accountable not only internally but to the general public as stakeholders?
- How accessible will Rule Changing be?

⁵⁹ Centre for Health Program Evaluation, Melbourne University

⁶⁰ Funnell S, Program Logic: An Adaptable Tool for Designing and Evaluating Programs” in Evaluation News and Comment, V6(1), 1997, pp 5-17

- Does the Government have a plan by which program analysis can be undertaken formally, and by which success criteria can be measured as the desired features of the outcomes represented in the outcomes hierarchy, defining more precisely the nature of the outcomes sought and the link between the stated outcome and the performance measures for that outcome in terms of both quantity and quality?”⁶¹

Evaluation is a sophisticated and scientific professional challenge. It is not just a trade, though compromises often make it so. Professional evaluators are humble people. They make no pretenses. Regardless of reputation or status, they are never too humble to ask for collaborative input and peer opinion and suggestion. Evaluation is a continuing process and does not start and end with data-gathering. They recognize the challenges of best practice data gathering and evaluation and do not pretend to have all the answers.

For instance, check out the University of Alabama’s EVALUTALK facility. American Evaluation Association Discussion List [EVALTALK@BAMA.UA.EDU]. This group is the cutting edge of evaluative practice. The rest of the world respects the results this group achieves.

Perhaps the AEMC, Ministerial Council on Energy, Productivity Commission will consider seeking specialist evaluation input with further evaluation of data, or perhaps consider costing out the options. Just a suggestion.

One such evaluator could be Bob Williams a highly respected NZ evaluator with an international reputation and particular expertise in public policy evaluation. He is a frequent visitor to Australia, and is a fairly well known figure in Australasian evaluation, through evaluations, his work within the Australasian Evaluation Society (AES) (which merged with Evaluation News and Comment under Bob Williams’ supervision) and his contributors to the two Internet discussions groups Evalutalk and Govteval. He has vast experience of Governmental evaluations.

On the online Evaluator’s Forum, EVALUTALK, Bob Williams responded that evaluators should not be seen as mere technicians doing what they are asked to do, but should be seen as craftspeople with a pride in their work and the outcomes of their findings long after the consultative process is over. There is a great deal of valuable consultative evaluation advice out there for the asking. Lay policymakers are not normally trained in this area.

Williams’ specialty is evaluation, strategy development, facilitating large-group processes and systemic organizational change projects. He has his own website under his name. Reviews books for Journal Management Learning, writes for Australasian Evaluation Society’s Journal. He wrote the entries on “systems” “systems thinking” “quality” and planning Encyclopaedia of Evaluation {Sage 2008} and co-wrote with Patricia Rogers in “Handbook of Evaluation” {Sage 2006}.

Bob Williams, has commented as follows on EVALUTALK

“The Ministry of Education here in New Zealand has been doing something very interesting for the past four or five years. The policymakers along with teachers, university researchers and others have been developing a series of “best evidence syntheses”. The concept of “best evidence” is fairly comprehensive with a set of agreed criteria for what constitutes “best” and “evidence”. As each synthesis is developed it is opened up for discussion with practitioners and academics - and placed on the Ministry of Education’s website. I was involved in some of the early discussions (as a facilitator rather than evaluator) and was impressed by both the method and the content of the syntheses.”

⁶¹ Funnell S, Program Logic: An Adaptable Tool for Designing and Evaluating Programs” in Evaluation news and Comment, V6(1), 1997, pp 5-17

“What I found most impressive was that the policymakers were brave include evidence that challenged some of the assumptions that have dominated education policymaking in the past few decades (e. g. the extent to which socio-economic status effects student performance).”

“The 2006 edition of the World Education Yearbook describes the BES Programme “as the most comprehensive approach to evidence” and goes on to say: “What is distinctive about the New Zealand approach is its willingness to consider all forms of research evidence regardless of methodological paradigms and ideological rectitude, and its concern in finding...effective, appropriate and locally powerful examples of “what works.”

Bob Williams suggests that before data gathering is undertaken the underlying assumptions must be made, followed by identification of the environment and environmental factors that will affect the way in which the intervention and its underlying assumptions will interact and thus behave. A recent dialogue between evaluators on that Discussion List produced a useful list of criteria that would cover the processes that should ideally be undertaken.

Though the inputs came from a number of Discussion List members, I cite below how Bob Williams⁶² a summarized as follows inputs from various evaluators participating on the Discussion List ⁶³:

1. Position the evaluation – that is, locate the evaluation effectively in its context, in the broader systems
2. Clarify the purpose and possibilities, etc (design phase – why do it)
3. Plan the evaluation (design phase) (what do we want to know)
4. Data Gathering (how will we find out what we want to know)
5. Making meaning from the data (e.g. analysis; synthesis; interpretation (how can we get people to be interested in the evaluation processes/results)
6. Using the results (shaping practice) (what would we like to see happen as a result of the evaluation and what methods promote that?)

Stanley Capella on the University of Alabama Online Evaluation Discussion Group EVALUTALK has whether evaluators should push for program decisions based on evaluation, or is this an advocate’s role.

Bob Williams a New Zealand Evaluator on the same discussion group has responded that evaluators should not been seen as mere technicians doing what they are asked to do, but should be seen as craftspeople with a pride in their work and the outcomes of their findings.

As suggested by Ovretveit⁶⁴

“Design is always balancing trade-off.” “Inexperienced evaluators are sometimes too quick to decide design before working through purposes, questions and perspectives.” These parameters cannot be decided “without some consideration of possible designs and the answers they could give” (since) planning is an interaction between the possible design and the questions and purposes.”

⁶² <http://www.eval.org>

⁶³ Bob Williams, Discussion List Member Evalutalk,

⁶⁴ Ovretveit (1997) Evaluating Health Interventions. Open Univ Press. McGraw-Hill (reprinted 2005), Ch 6

“Ideas which are fundamental to many types of evaluation are the operational measure of outcome, the hypothesis about what produces the outcome, an open mind about all the (factors) that might affect the outcome and the idea of control of the intervention and variable factors other than the intervention.”

“Randomized experimental designs are possible for only a portion of the sittings in which social scientists make measurements and seek interpretable comparisons. There is not a staggering number of opportunities for its use⁶⁵

“Politicians often do not examine in detail the cost and consequences of proposed new policies, or of current policies.”⁶⁶

As suggested by Ovretveit⁶⁷

“Design is always balancing trade-off.” “Inexperienced evaluators are sometimes too quick to decide design before working through purposes, questions and perspectives.” These parameters cannot be decided “without some consideration of possible designs and the answers they could give” (since) planning is an interaction between the possible design and the questions and purposes.”

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In discussing better informed political decisions Ovretreit noted, for example, the lack of prospective evaluation or of even small scale testing of internal market reforms in Sweden, Finland and the UK.

Whilst he did not infer that all new policies should be evaluated or that the results of an evaluation should be the only basis on which politicians decide whether to start, expand or discontinue policies, just that politicians could sometimes save public money or put it to better use if they made more use of evaluation and of the *“evaluation attitude.”*⁶⁹

Ovretreit⁷⁰ embraces six evaluation design types: descriptive (type 1); audit (type 2) outcome (type 3); comparative (type 4); randomized controlled experimental (type 5) and intervention to a service (type 6) Each of these six broad designs can and have been successfully used in a variety of interventions targeted at examining policies and organizational interventions, depending on which of the four evaluation perspectives have been selected: quasi-experimental; economic; developmental or managerial⁷¹

⁶⁵ Webb et al 1966 c/f Ovretveit Evaluating Health Interventions, *Evaluation Purpose Theory and perspectives* Ch 2, p31

⁶⁶ Ibid, Ovretveit Evaluating Health Interventions, Open Univ. Press. McGraw-Hill (reprint 2005), Ch 2, p 27

⁶⁷ Ibid Ovretreit (1997) Evaluating Health Interventions. Ch 6

⁶⁸ Webb et al 1966 c/f Ovretveit Evaluating Health Interventions, *Evaluation Purpose Theory and perspectives* Ch 2, p31

⁶⁹ Ibid, Ovretveit Ch 2, p27

⁷⁰ Ibid Evaluating Health Interventions Six Designs Ch 3

⁷¹ Ovretreit’s Model Evaluating Health Interventions, Ch 3 *ibid*, p73

In recent years there has been increasing pressure on all scientists to communicate their work more widely and in more accessible ways. For evaluators, communication is not just a question of improving the public image of evaluation, but an integral part of their role and one of the phases of an evaluation. It is one of the things they are paid to do. Here we consider evaluators' responsibility for communicating their findings and the different ways in which they can do so.

The following is an abstract from Edmund Chatto's 1995 Research Project L 122-251-013 funded by the ESRC under their Economic Beliefs and Behaviour Programme.⁷² The paper

".....addresses three linked difficulties in using economic and sociological theories of consumer decision-making as the basis for a computational model. The first difficulty is the non-operational nature of many of the theories. Their explanatory power cannot be assessed using data that can actually be obtained.

The second difficulty is that of grounding, of what a given theory rests upon by way of lower level constructs and explanations. This gives rise to the final difficulty, that of reconciling both the aims and methods of economic and sociological theory. In each case, the computational perspective provides a measure of clarification and potential for development."

Daniel L Shufflebaum's Program Evaluations Metaevaluation Checklist is worth looking at.⁷³

Michael Scriven's Key Evaluation Checklist is a useful resource⁷⁴. Scriven's Checklist poses some challenging questions that are touched on here in good spirit:

1. *Can you use control or comparison groups to determine causation of supposed effects/outcomes?*
2. *If there is to be a control group, can you randomly allocate subjects to it? How will you control differential attrition, cross-group contamination, and other threats to internal validity.*
3. *If you can't control these, what's the decision-rule for aborting the study? Can you single or double-blind the study.*
4. *If a sample is to be used, how will it be selected; and if stratified, how stratified?*
5. *If none of these apply, how will you determine causation (the effects of the evaluand)*
6. *If judges are to be involved, what reliability and bias controls will you need (for credibility as well as validity)?*
7. *How will you search for side effects and side impacts, an essential element in almost all evaluations*
8. *Identify, as soon as possible, other investigative procedures for which you'll need expertise, time, and staff in this evaluation, plus reporting techniques and their justification*
9. *Is a literature review warranted to brush up on these techniques?*

⁷² Chattoe, E. (1995) Can Sociologists and Economists Communicate? Project L 122-251-013 funded by the ESRC under their Economic Beliefs and Behaviour Programme. Department of Sociology, University of Surrey, Guildford, GU2 5XH (plus an impressive array of reference on Consumer Behaviour)

⁷³ Shufflebeam, D. L. (1999) Program Evaluations Metaevaluation Checklist, based on The Program Evaluation Standards (University of Michigan)

⁷⁴ Michael Scriven's Key Evaluation Checklist <evaluation.wmich.edu>

Texts such as *Schiffman and Kaunk's Consumer Behaviour*⁷⁵ may provide some useful insights during the evaluative process.

As previously mentioned, The University of Alabama's EVALUTALK site has a host of useful insights about evaluation design. As discussed by Fred Nichols of Distance Consulting, Recent discussions are focused on Roger Kaufman's mega-planning model, based on his notion of needs assessment.

*"Logic models can be described as frameworks for thinking about, including evaluating a program in terms of its impact, stakeholders, processes, inputs, etc. Typically these run from inputs through activities/processes to outputs/products, outcomes/results and impact, including beneficiaries"*⁷⁶

In response to Fred Nichols comments, Sharon Stone on the same EVALUTALK, comments on the assumptions that include program theory and external conditions (meaning factors not included that could affect positively or negatively the hypothesized chain of outputs, outcomes).

Stone⁷⁷ poses two questions:

"Are these just "logical chains" – or are these cause the effect"

Either way – are things really that simple – or do we need to pay more attention to those 'external' factors" – and how they are identified as external

*Patton (1980)*⁷⁸ has estimated over a hundred approaches to evaluation. He describes four major framework perspectives – the experimental, the economic, the developmental and the managerial.

Patton (1980) claims:

*"One reason why evaluation can be confusing is that there are so many types of evaluation. Case-control, formative, summative, process, impact, outcome, cost-utility, audit evaluations."*⁷⁹

Funnel (1996) has some views on Australian practices in performance measurement. His 1996 article in the Evaluation Journal of Australasia⁸⁰ provides broad-brush review of the state of evaluation for management in the public service.

Funnell(1996) provides explanations of jargon such as benchmarking, TQM, quality assurance and she also explores issues relating to the current political climate of progressive cutbacks and how these have affected the use of process evaluation. The form of process evaluation she is examining is seen as 'managerial accountability p452).

As well *Funnell (1996)* explores the impact of cutbacks on the conduct of **evaluations, the levels of** evaluation expertise available and on evaluation independence and rigor. Her arguments on the impact of market-based policies imply there could be both benefits and dangers.

⁷⁵ Schiffman, Leon G and Kanuk, Leslie Lazar Consumer Behaviour. Prentice-Hall International Editions

⁷⁶ Fred Nichols, Senior Consultant, Distance Consulting on EVALUTALK, American Evaluation Association Discussion List [EVALTALK@BAMA.UA.EDU]; on behalf of; nickols@att.net

⁷⁷ Sharon Stone, Evaluator, on EVALUTALK, University of Alabama September 2007

⁷⁸ Patton (1980) Qualitative Evaluation Methods, London Sage, c/f Evaluation Purpose and Theory in Evaluating Health Interventions

⁷⁹ See Patton, M. Q. (1997) Utilisation Focused Evaluation. The new Century text 3rd edn.

⁸⁰ Funnell S (1996): Reflections on Australian practices in performance measurement, 1980-1995. Evaluation Journal of Australasia 8(1), 36-48

*Hawe and Degeling (1990)*⁸¹ have some ideas of survey methods and questionnaire design. These authors describe random, systematic, convenience and snowballing sampling and look at questionnaire layout and presentation; the need for piloting and some simpler basic description analysis of quantitative and qualitative data. For more sophisticated analysis such as may be warranted before any decision is made by the Government to deregulate in the energy industry may warrant the employment of a highly trained researcher, recently trained.

These authors examine a) the types of items; (b) questionnaire layout and presentation; (c) the need for piloting (this is often overlooked by evaluators undertaking small-scale evaluations; d) maximizing response rates.

Note their comments on the analysis of quantitative and qualitative data. These comments describe simple, basic descriptive analysis. For more sophisticated analysis evaluators should employ a trained researcher.

*Funnel (1997)*⁸² has discussed program logic as a tool for designing and evaluating programs. This is simply a theory about the causal linkages amongst the various components of a program, its resources and activities, its outputs, its short-term impacts and long-term outcomes. It is a testable theory, and must be made explicit as a first step to testing its validity.

The process by which this is achieved is program analysis. This is a job for an expert in evaluation where major government policy is being reexamined.

As *Funnell (1997)*⁸³ points out, the many models of program theory

“date back to the 1970s and include amongst others Bennett’s hierarchy of evidence for program evaluation within the context of agricultural extension programs and evaluability assessment techniques developed by Wholey and others.”

A typical program logic matrix may include a grid that includes ultimate and intermediate outcomes, and immediate impacts, with success criteria being measurable and specific in accordance with the SMART principles.

One theme in the responses (TO EVALUTALK) as summarized by Johnny Morrell), is that

*“.....logic models can be seen as constructions that can be used to test key elements of a program’s functioning.”*⁸⁴

Related to 1.1 is the notion that logic models can be seen in terms of path models in analytical terms.

To me, this gets at the notion that while there is a useful distinction between “design” and “logic model”, the distinction is a bit fuzzy. Presumably, if one had enough data, on enough elements of a logic model, one could consider the logic model as a path model that could be tested.

⁸¹ Hawe, P., Degeling D., & Hall, J (1990) Evaluating Health Promotion, Ch 7 Survey Methods and Questionnaire Design, Sydney, McLennan & Petty

⁸² Funnel S “:Program Logic: An adaptable Tool for designing and Evaluating Programs in Evaluation news and Comment v.6(1) 1997 pp 5-17. Sue Funnell is Director of Performance Improvement Pty Ltd and chair of the AES Awards Committee.

⁸³ Ibid Funnell Program Logic, p5

⁸⁴ American Evaluation Association Discussion List [EVALTALK@BAMA.UA.EDU] as summarised by Johnny Morrell, PhD, Senior Policy Analyst, Member American Evaluation Association EVALUTALK Discussion Group

From a practical point of view, I still see logic models as guides for interpretation, and design as the logic in which we embed data to know if an observed difference is really a difference. But the distinction is not clean.

Related to 1.1 is the notion that logic models can be seen in terms of path models in analytical terms. To me, this gets at the notion that while there is a useful distinction between “design” and “logic model”, the distinction is a bit fuzzy. Presumably, if one had enough data, on enough elements of a logic model, one could consider the logic model as a path model that could be tested.

“From a practical point of view, I still see logic models as guides for interpretation, and design as the logic in which we embed data to know if an observed difference is really a difference.

But the distinction is not any given logic model is never anything more than a work in progress that has to be updated on a regular basis. With this approach, logic models (and the evaluation plans they drive), can be updated as the consequences of program action evolve.⁸⁵

The major point in this category is that “design” means a lot more than a logic for looking at data. According to this view, “design” includes procedures for gathering data, schedules for doing evaluation tasks, and so on. Johnny Morrell calls this “an evaluation plan, and reserve the term ‘design’ for the logical structure of knowing if observations have meaning.”⁸⁶

There is a consensus amongst EVALUTALK members that

“the use of logic models (may be seen as) a consensus building tool. The notion is that logic models come from collaborative cross-functional input from various evaluator and stakeholder groups. Thus, the act of building a logic model works toward common vision and agreed upon expectations.”

Swedish evaluator John Ovretreit (1987, reprinted 2005)⁸⁷ has written a classic text on evaluative intervention. Though focused on health interventions, the principles are as relevant to other areas.

Rossi’s evaluation theory⁸⁸ is about whether the intentions of the program were effected by delivery to the targeted recipients. This task is typically undertaken by independent evaluators and can be a stand-alone evaluation if the only questions addressed focus on operational implementation, service delivery and other matters. This form of evaluation is often carried out in conjunction with an impact evaluation to determine what services the program provides to complement findings about what impact those services have.

One example of a combined process and summation evaluation is shown in the study reported by Waller, A. E, Clarke, J. A., Langley, J. D. (1993). An Evaluation of a Program to Reduce Home Hot Water Temperatures. *Australian Journal of Public Health* (17(2), 116-23.

In that study, the summative component was inbuilt into the original program design. The findings were inclusive and relatively useless primarily because of flaws in conceptual assumptions made. However there were lessons to be learned in designing other similar studies, so the pilot study was not entirely wasted.

⁸⁵ Johnny Morrell on EVALUTALK, American Evaluation Association

⁸⁶ Ibid Johnny Morrell

⁸⁷ Ovretreit (1997) Evaluating Health Interventions. Open University Press. McGraw-Hill (reprinted 2005)

⁸⁸ Rossi, P., Freeman and Lipsey, M. “Monitoring Program Process and performance: Evaluation: A Systematic Approach (6th edition) Sage, 1995, pp 191-232

[Rossi \(1995\)](#) examines outputs and outcomes as distinct components of an evaluative program, with the former referring to products or services delivered to program participants (which can be substituted for end-consumers) and with outcomes relating to the results of those program activities (or policy changes).

Program monitoring can be integrated into a program's routine information collection and reporting, when it is referred to as MIS, or management information system. In such a system data relating to program process and service utilization is obtained, compiled and periodically summarized for review.

The University of Alabama's EVALUTALK site has a host of useful insights about evaluation design. As discussed by Fred Nichols of Distance Consulting, Recent discussions are focused on [Roger Kaufman's](#) mega-planning model, based on his notion of needs assessment.

[Patton \(1980\)](#)⁸⁹ has estimated over a hundred approaches to evaluation. He describes four major framework perspectives – the experimental, the economic, the developmental and the managerial.

[Patton](#) claims:

*“One reason why evaluation can be confusing is that there are so many types of evaluation. Case-control, formative, summative, process, impact, outcome, cost-utility, audit evaluations.”*⁹⁰

[Funnell \(1996\)](#) has some views on Australian practices in performance measurement. His 1996 article in the Evaluation Journal of Australasia⁹¹ provides broad-brush review of the state of evaluation for management in the public service.

[Funnell \(1996\)](#) provides explanations of jargon such as benchmarking, TQM, quality assurance and she also explores issues relating to the current political climate of progressive cutbacks and how these have affected the use of process evaluation. The form of process evaluation she is examining is seen as ‘managerial accountability’ (p452).

Swedish evaluator John Ovretreit (1987, reprinted 2005)⁹² has written a classic text on evaluative intervention. Though focused on health interventions, the principles are as relevant to other areas.

Of quality assurance [Davey and Dissinger](#) said:

“Quality assurance (QA) and evaluation are complementary functions which collect data for the purpose of decision-making. At the process level, quality assurance provides both a system of management and also a framework for consistent service delivery with supporting administrative procedure.

When implemented appropriately QA methods provide rapid feedback on services and client satisfaction, and a means to continuously upgrade organizational performance.

*Despite client feedback being part of QA, it lacks the depth provided by evaluation in determining individual client outcomes from a person-centered plan for service delivery.*⁹³

⁸⁹ Patton (1980) Evaluation Purpose and Theory

⁹⁰ See Patton, M. Q. (1997) Utilisation Focused Evaluation. The new Century text 3rd edn.

⁹¹ Funnell S (1996): Reflections on Australian practices in performance measurement, 1980-1995. Evaluation Journal of Australasia 8(1), 36-48

⁹² Ovretreit (1997) Evaluating Health Interventions. Open University Press. McGraw-Hill (reprinted 2005)

⁹³ Davey, R. V. and Dissinger, M Quality (1999) Assurance and Evaluation: essential complementary roles in the performance monitoring of human service organisations. Paper presented at Australasian Evaluation Society Conference, Melbourne 1999, p 534-550

The Companion Wallis Consulting Retailer and Consumer Surveys identified fairly well matched perceptions according to the summary comparative findings.

Awareness levels amongst consumers besides knowing of the ability to choose, as clearly extremely low. Energy is a low engagement commodity/service, active marketing is necessary with product differentiation and attractive offers including a range of convenience options or discount packages.

MARKET FAILURE FACTORS

Evaluation and analysis factors impacting on market failure

Interpretations that **switching conduct** is predictive of real outcomes in an unstable market are yet to be substantiated.

Much discussion on the Productivity Commission site and in responses to AEMC and other consultative processes has focused on behavioural economics and the value of superficial evaluation of switching conduct. I will not repeat those arguments here, save to say that the data relied upon does not appear to robustly embrace these principles.

Gavin Dufty's (November 2007) just published Submission to the Retailer Review First Draft Report⁹⁴ on behalf of St Vincent de Paul Society could not have more succinctly or sharply highlighted the deficiencies in the AEMC's analysis of the market and its perception that retail competition has been a success. That is not a perception shared by everyone, including consumer groups and many second-tier retailers alike.

Mr. Dufty has approached the counter-analysis of findings by the AEMC using half-full-glass vs half-empty-glass comparative model to show how easily figures can be creatively used to show one trend or another to support either perspective just as well. Mr. Dufty's analysis puts some balance into the interpretation of figures:

"In undertaking such an evaluation it could be argued that close to two thirds of the Victorian market is experiencing some form of market failure. For example in its draft review the AEMC cites that consumer surveys show that 60% of Victorian regulated energy consumers have switched to a market offer, conversely 40% have not.

That is, over one third of the market either did not seek, were not offered or decided not to switch to a market contract; a significant number by anyone's measure given the market has been open to competition for five years."

"Furthermore of the 60% that have taken market offers 70% of domestic and 60% of commercial customers said contracts had met expectation. Or conversely, 30% of domestic and 40% of commercial customers that took up market offers indicated that these contracts did not meet their expectation."

"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 it has either failed their expectations or they are not actively participating."

Mr. Dufty has also expressed concern at the omission of the draft review to effectively explore the critique the current market failure within the Victorian energy market. What he has politely suggested may be a significant oversight can also be interpreted as a view that is less than balanced in the eagerness to show how successful retail competition has been.

⁹⁴ AEMC Review of the Effectiveness of Competition in Gas and Electricity Retail Markets Submission on behalf of St Vincent de Paul Society Gavin Dufty for Victorian Council of Social Service November 2007

For a while the public has been questioning the independence of opinion with which the AEMC may be handling proper assessment of the market. It is important to objectively assess the state of the market its volatility and the numerous markers of market failure, not only from consumer perspectives, but also from the standpoint of retailer failure.

It certainly seemed very clear to the public at the time of the media release published to coincide with the publication of AEMC's First Draft Report that the decision had already been made, even before responses had been obtained to that report or the Consumer Policy Framework was in place.

By more correctly showing that the market performance measures indicate that 58-64% or close to two thirds of the Victorian market is experiencing market failure Mr. Dufty has expressed concern that no attempt had been made to examine the issues affecting those either not actively participating or believing that the market had failed their expectations.

He has discussed a concern shared by the whole community – the likelihood that standing offers will be removed from the regulatory framework before any analysis has been done to evaluate their role in promoting competition; and the potential for an increased and more complex regulatory framework for various groups that have been deemed to be excluded from the market.

The data cited by CUAC and others and their concerns as collectively expressed by them and other community organizations speak for themselves.

PIRAC Consulting in their recent submission to the Productivity Commission examines the concepts of behavioural economics in some depth and also supports the view that consumers do not always make decisions in their best interests and that it can take years for the full adverse consequences of ill-informed and ill-considered decisions.

Other aspects of market failure have been the recent RoLR event affecting 11,000 consumers; the sell-out of Momentum Energy's 15,000 unhedged residential customers, the takeover by Ergon Energy of Powerdirect as an established inaugural second-tier retailer

John Smith, Chairman of Jackgreen, a greenenergy specialist retailer currently selling electricity only though with licences in NSW and South Australia to sell gas, observes that⁹⁵

“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!”

⁹⁵ Jackgreen Annual Report 2005/2006 – Chairman's Report

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.

John Smith for Jackgreen continued in his report:

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.

On 23 June 2007 The Age had reported⁹⁶ the failure of Energy One and transfer of its customers to other retailers, of which there were 5000 spread across Queensland, NSW, the ACT and Victoria.

The Age reported that EnergyOne had been formed in 1996 and listed on the stock exchange in January, and (had) also entered into a trading halt on the ASX. Its shares were valued at the time at 58c after reaching a high of \$1.26 in January.

The Age report identified the issues as follows:

“The problems facing upstart retailers have been underlined in recent days as energy demand hit a high in NSW where spot prices, which are set half hourly, were close to \$10,000 per megawatt hour, and winter records were set in Victoria and South Australia.”

“Steve Edwell, chairman of the Australian Energy Regulator, said retailers were being squeezed in the middle, forced to absorb high prices but unable to pass them on to consumers.”

“If there is a lesson out of this at an early stage, it is that energy markets can be volatile and traders need to have a strong risk mitigation strategy and future hedging in place,” he said. “I expect the reasons and the impacts of the market on this retailer will be assessed closely by us and others. We need to make sure the lights don’t go out for the Energy One customers.”

“Gavin Dufty, manager of social policy and research with St Vincent de Paul, said the situation was unprecedented and regulators had to make sure that Energy One’s customers were protected.”

“There are so many questions that arise: Will these customers have the same terms and conditions as before? What will their contract be like? These are questions that I think are only being worked through now,” he said. “Will Energy One be the first of many, will all these second-tier retailers start falling?”

“Energy One’s customers are largely in the small business area and predominantly in NSW. It has only two customers in Victoria, one in the ACT and about 160 in Queensland.”

Under the retailer of last-resort scheme, each energy retailer is required to list another retailer to supply its customers with electricity if it enters a suspension. It is believed Energy Australia could take Energy One’s customers.

⁹⁶ The Age 23 June 2007 Energy One Stripped of Customers
<http://www.theage.com.au/news/business/energy-one-stripped-of-customers/2007/06/22/1182019371245.html>

The purpose is to develop a retailer of last resort (RoLR) scheme to ensure that electricity and gas customers continue to receive electricity and gas supplies in circumstances where their existing retailer is unable to continue to provide that supply. The establishment of an effective RoLR scheme is an integral part of the institutional and regulatory framework for full retail contestability.

The preface to the Essential Services Commission Final Decision of the Retailer of Last Resort Scheme reads as follows:

“A retailer of last resort (RoLR) scheme is intended to ensure that electricity and gas customers continue to receive electricity and gas supplies in circumstances where their existing retailer is unable to continue to provide that supply. This may be because the retailer ceases to be licensed to sell electricity or gas, so that it is legally prohibited from continuing the supply, or because it is unable to access electricity or gas in the wholesale market to supply its customers. The establishment of an effective RoLR scheme is an integral part of the institutional and regulatory framework for full retail contestability. There is a clear legislative intent in both the Electricity Industry Act 2000 and the Gas Industry Act 2001 for the Commission to develop RoLR schemes as part of the regulatory framework in both the electricity and gas supply markets.”

“This final decision paper contains final decisions regarding the energy RoLR scheme developed by the Commission. The paper considers the assignment of RoLR responsibility, terms and conditions, pricing, and implementation issues. Following the amendments to the RoLR legislative provisions that have been agreed between the Commission and the Department of Infrastructure, the Commission intends to commence a consultation process for the development of a RoLR regulatory instrument.”

International Power retails electricity in both Victoria and South Australia under the Energy Australia brand as part of the EA IPR Retail Partnership.¹⁷¹

CONSUMER IMPACTS (in brief)

(see also section on The Public Interest Test and Social Impacts Associated with Competition Policy p 156- 218)

“The First Draft Report suggests that the measures have already been developed and implemented a range of measures to safeguard the interests of these customers unable to effectively participate in the market”

Yet these arrangements are not in place yet. The Productivity Commission’s Enquiry into Australia’s Consumer Policy framework is complete and the first draft report not yet ready.

Regarding complaints scheme limitations and consumer advocacy, I refer on passing only to the comments recommendations made by South Australian Council of Social Services to the Productivity Commission.

Those recommendations included the following:

“Recommendation: *The (Productivity) Commission give urgent attention to the need to support independent consumer advocacy organizations in each state and territory of Australia to ensure equity of access for vulnerable and disadvantaged consumers to advocates and information.”*

The disjointed approach to consumer advocacy in Australia comes from strong need to establish a National Consumer Council to unify advocacy groups and present a national body to inform policy discussion and debate, as well as having the ability to initiate processes to tackle the complex issues that can arise in consumer advocacy.

There is an urgent need for careful consideration of proper protections for the vulnerable groups. The position of “inset customers” “embedded network consumers” and those receiving bulk hot water under arrangements that are well overdue for reconsideration in the public interest and in the interests of restoring fundamental common law, statutory, social justice and natural justices entitlements.

The next stage of Retail Competition Review if conducted at the same speed with as little meaningful stakeholder input in a timely way will not have a proper opportunity to

“provide targeted and practical advice to the Government regarding measures that would enable all classes of customers to experience the benefits of a superior competitive environment.”

As to considering at this stage removing the standing offer pricing arrangements, despite any plan for a transition process, with the consumer protection framework still on the drafting board; regulatory measures not yet determined; and so much else happening, it would seem that this is not only a premature step but would place a substantial proportion of consumers at high risk.

See for example UnitingCare Wesley’s analysis of consumer impacts in South Australia within a couple of years of the introduction of Full Retail Contestibility, discussed in more detail under (*see also section on The Public Interest Test and Social Impacts Associated with Competition Policy pp199-206*)

Refer also to *Andrew Nance’s* 2004 personal submission to the MCE⁹⁷ on retail regulation issues is hard-hitting, direct and uncompromising in its evaluation of consumer impacts as a result of FRC and “competition” goals as implemented. This too is further discussed in the same section with direct quotes from that submission as a public domain document. (*see full discussion and direct citation pp 203-204*)

Now the community faces price deregulation also. I quote verbatim from that submission below and suggest that the same concerns should apply to all states, now some three years later, even though it must be recognized that prices are higher for residential electricity in South Australia than in other states.

For the time being I repeat Andrew Nance’s perceptions as far back as 2004:

“...The dysfunctional nature of the current advocacy arrangements (and subsequent capacity in the jurisdictions) is widely acknowledged by EMR Officials yet, to add insult to injury, submissions on this issues paper are due before even the earliest discussions on improving consumer advocacy.”

“There has been no convincing argument presented that this latest attempt to rearrange the deckchairs on the Titanic will actually provide any tangible benefit to consumers. This industry has an impressive ability to capture and retain any efficiency gains and manufacture new elements of risk for which consumers must reward them for managing. Where’s the cost-benefit analysis.”

Having said that, the rights of the entire community are also issues of public interest. It cannot possibly be acceptable to strip these rights away by incorporating into energy-specific provisions anything that will have the effect of making less accessible or altogether unreachable the entitlements that are in place within other protections under Acts of Parliament or other provisions.

⁹⁷ 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>

Please refer to the Wesley Voice publication Spring Quarterly 2004⁹⁸ published with the view of examining what had happened since the application of competition policy

Though relating to competition issues dating back to earlier FRC days, the issues raised and the hard data published serve as eye openers into issues relating to consumer protection and the absence of evidence that large sub-sets of energy end-consumers have benefited from FRC.

That important article was published to examine the impact of competition policy introduced in the 1990s to open up the Australian energy market to competitive forces, in the expectation that competition would achieve cheaper prices for consumers and reduce risks to Government.

Wesley Voice made the following recommendations. Further extracts included in the *(see also section on The Public Interest Test and Social Impacts Associated with Competition Policy pp162-221)*

“Summary

The application of competition policy to energy markets in South Australia has led to significant increases in electricity prices for residential consumers with particular hardship being caused for low income and vulnerable households.

There is a need for concerted action at all levels of the South Australian community including:

- *It is appropriate that the broader community take active steps to reduce their demand for electricity.*
- *State Government needs to ensure that fuel driven poverty is understood before making further changes to the States energy market.*
- *State Government also needs to review concession policies in the light of growing in energy related hardship.*
- *ESCoSA, the Regulator has a role in requiring transparency of the market through readily available data.*
- *ESCoSA must ensure that hardship provisions are established and applied, recognising that electricity is an essential service and so is different from other standard market goods.*
- *ESCoSA needs to require effective hardship policies from retailers and explore socially responsible tariffs.*
- *GST should be removed from residential electricity bills.*
- *State Government should return to the market as a generator, using renewable energy technologies.*
- *An industry levy is needed to assist with funding financial counselling, in the first instance and other vulnerable household assistance.*
- *The whole community is urged to embrace “Solar Adelaide”, increasing our use of solar energy and reducing the need for new infrastructure.*

⁹⁸ Wesley Voice Spring Quarterly 2004 pgs 1-8 Low income people and energy choices – background to SA Energy Market; and Characteristics of Economic Goods/Services and ‘Essential services’ p 9 found at <http://www.unitingcarewesley-sa.org.au/Portals/0/WesleyVoice%20Issue%201%20--%20Spring%202004.pdf>

I again draw attention to David Tennant's⁹⁹ views. He believes that there is room for a Commission for Effective Markets. He describes **effective as efficient, sustainable and fair**. It is not public opinion that this is currently the case or that proposed energy reform measures will achieve that goal. Yet the dye seems to be cast and the market is hurtling in a direction that may injure market participants as well as further injure the general consuming public, and vulnerable and disadvantaged consumers in particular.

I again urge the AEMC and Productivity Commission to examine the critical input by Gavin Dufty, Social Scientist, St Vincent de Paul in his 2004 VCOSS Paper examining government policy and attitude in relation to Universal Service Obligations¹⁰⁰

The ultimate goal should be to create consumer protections for the wider Victorian community, but particular for those who are vulnerable or disadvantaged for a variety of reasons not limited to financial disadvantage.

The aim would be to ensure that consumers and other stakeholders are not placed in untenable positions of second-guessing their entitlements and to have to individually fight for them through complaints and litigious processes because of conflicting policies and legislative provisions adopted by various statutory bodies, some clearly in consumer detriment; or because access to justice is compromised for procedural or economic reasons.

Chris Field has wisely suggested that a first principles framework approach to policy design is warranted. It is difficult to know how long it will realistically take to develop such a framework and implement it. At this stage the time-line to implement regulation reform looks to be some 15 months for the first target state, Victoria.

It would seem that the Wallis surveys did not seek information from those who have **no choices at all** – such as **embedded network end-consumers** or those in a similar position (even if the term embedded network is not strictly applicable) living in multi-tenanted private rental accommodation, where the body corporate did the choosing, and the end-user is dumped with an inappropriate contractual status in situations where no separate gas or electricity meters.

Though perhaps this discussion may more conveniently be included with the section on consumer detriment it is mentioned here because it is pertinent to consumer awareness of the packages being offered, how **deemed contracts** are interpreted and how their decisions should be governed if they make switching decisions to accept contracts with providers prepared to creatively interpret their unilaterally perceived contractual status.

⁹⁹ David Tennant, Director Care Financial Inc. ACT, author of *"The dangers of taking the consumer out of consumer advocacy."* Speech delivered at 3rd National Consumer Congress, hosted by Consumer Affairs Victoria Melbourne 16 March 2006 available at <http://www.afccra.org/documents/TheDangersofTakingtheConsumeroutofConsumerAdvocacy.doc>

The paper disagrees with the position adopted by Dr. Chris Field. The paper particularly disagrees with the view that "Consumer advocates should, as a first principle, be a voice for competition" It discusses alternative definitions of consumer advocate and the dangers of policy dogma. This ideology should be revisited and examined in the light of proposed policy changes

¹⁰⁰ Refer for example to G Dufty "Who Makes Social Policy?– The rising influence of economic regulators and the decline of elected Governments. VCOS Congress Paper 2004¹⁰⁰ and Tamblyn, J. Powerpoint presentation at World Forum on Energy Regulation, Rome September 2003 *"Are Universal Service Obligations Compatible with Effective Energy Retail Market Competition?"* John Tamblyn was the Chairperson Essential Services Commission Victoria. He is now Chairperson of the AEMC.

These customers will not benefit at all from further moves to deregulate the market and if they continue to be inappropriately labeled as contractually obligated instead of the Owners_Corporation for bulk energy supplies used to heat centrally heated boiler tanks with calculations made not be site specific visits for meter reading (despite application of supply charges) but by alleged reading of water meters posing as gas or electricity meters, with water volume being measured to calculate average gas or electricity consumption by several individual tenants in multi-tenanted dwellings.

I am very concerned about the implications of some of these *‘innovative demand side initiatives,’* and in particular the issue of embedded networks, the new NEM Metrology Procedures¹⁰¹ and the decision of government to exempt certain suppliers from holding distribution licences or a retail supply licence. GRIDX’s application was recently approved by the AER, apparently *“in the public interest.”*¹⁰²

See for example: *Embedded Networks and Retail Competition Final Determination Prepared by Strategy and Development for NEM v No 1.0 Issue date 22 August 2007* and the formalized NEM Metrology Procedures that followed referring to child and parent embedded networks without regard to the contractual issues that I have repeatedly raised impacting on end-consumers.

As discussed elsewhere on 24 July 2007 Australian Power and Gas had purchased from Momentum Energy their **15,000** unhedged Victorian customers – a market that Momentum could no longer afford because of wholesale prices.

Since its market failure on 22 July 2007 and withdrawal from the retail electricity market as a second-tier retailer because wholesale prices became impossible to sustain viability, Momentum Energy has decided to focus on billing operations and the **embedded network market**.

There are past cautionary tales of those using loopholes embedded network arrangements, as discussed below¹⁰³

In the case of those receiving bulk energy for hot water supplies without separate meters the contract lies with the owner’s corporation entity (body corporate). Deemed contract provisions in existing provisions were never intended to apply to end users who were receiving energy supplies that could not be measured at all.

They referred either to those entitled to standing offers at the time of the introduction of full retail competition, or else to those who accepted supply and then refused to honour a contract undertaken or illegally used supplies.

In the case of those whose bulk energy cannot be measured precisely and using proper trade measurement practices, these provisions seem to have been conveniently and inappropriately applied where the proper contract lies with the owners’ corporation. The body corporate invites the energy supplier onto the premises to fit the metering installation and commences to take supply from the moment the infrastructure is in place.

¹⁰¹ See National Electricity Metrology Procedure NRMCO V 1.20 Doc No MT_OP1985v001 found at <http://www.nemmco.com.au/meteringandretail/640-0139.pdf>

¹⁰² See Embedded Networks and Retail Competition Consultation Final determination 22 August 2007 and NEM Metrology Procedures found at <http://www.nemmco.com.au/meteringandretail/618-0012.htm>

¹⁰³ See for example “Embedded Networks – Disconnecting Consumers” CUAC Spring Quarterly 2005 Article by Tim Brook, pp 11-12

A supply charge is effective at that point in time, following an implicit contractual arrangement between body corporate entity and bulk energy supplier. The **distribution supply point** is the point of the **double custody changeover point** from wholesaler to retailer (or other middleman), and thence to the point where the gas or electricity leaves the distribution system and enters the outlet of the meter on common property infrastructure.

There is **one supply point for energy** (though it is more than possible that hidden supply charges to include the inappropriate reading of water meters to determine energy usage may be applied). The supply point at the outlet of the meter is on the body corporate common property and therefore there should be only **one supply charge** – for the reading of the gas meter. Landlord's or their representatives cannot charge for any utility not individually metered and his arrangement with the bulk supplier is undertaken in that knowledge and implies acceptance of his legal responsibilities under the Residential Tenancies Act. Water that has not water efficient devices fitted cannot be charged for.

In any case energy retailers are licenced to sell gas or electricity and not water products, value-added products or any other products. If energy cannot be appropriately measured with instruments designed for the purpose it is impossible to see how they can be charged for or any contract deemed to exist.

Creative and apparently bizarre practices are in place to allow for magical algorithm conversion factor formulae to be used to assess energy usage, apparently without the benefit of site reading, though much is made of access to meters that are not even designed for the purpose.

In Victoria there practices are apparently endorsed by regulators who explain their adoption by reference to aims to minimize price shocks for low-income individuals. What is missed is that the contract does not belong to the end user at all in these circumstances. Attempts to implement regulations that have the effect of stripping end-users of their common law contractual rights need to be reconsidered in the public interest, in deference to existing legislative and common law provisions; in the interests of adopting best trade measurement practice and in the simple interests of justice and fairness. If these matters are not properly addressed in the design parameters in the design framework, further consumer detriment will result.

Many current and proposed arrangements appear to have had the effect of seeming to ignore the fundamental common law contractual rights of individuals, or protections under other legislations; or indeed even within energy regulations.

As to appropriate trade measurement practice and implementation of best practice, or at least adoption of procedures that represent the intent and spirit of the law, there is much room for improvement here in the public interest. See for example *Patty V 18R National Trade Measurement Act 1960 Part V 18R* regarding the appropriate use of trade measurement instruments for the purpose designed. Water meters are not suitable instruments for measurement of gas or electricity and when utility exemptions are lifted as is the intent this practice will become invalid and illegal. Refer to Victorian bulk hot water pricing and charging provisions and in other states.

Check these provisions against CUAC's September 2005 Quarterly article authored by Tim Book **"Embedded Networks – Disconnecting Consumers."**¹⁰⁴

¹⁰⁴ CUAC Spring Quarterly September 2005 Embedded networks Disconnecting Consumers p 11 and 12 Article by Tim Brook. Discusses practices of unlicensed energy distributors apparently exempted under State provisions from compliance with regulations and charging up to ten times the going rate for regulation prices of electricity and gas.

There are numbers of issues that I would like to raise with policy advocacy agencies including CUAC, EAR. The plight of embedded consumers generally and end-consumers of energy used to heat bulk hot water is quite different to those cited in Tim Brook's article in CUAC's Spring 2004 edition in which the VTAC case (*Winter v Buttigieg*) case was briefly discussed.

In the case of the matters brought before VCAT by the Tenants Union Victoria, the end-embedded end-consumers were receiving domestic supplies in embedded networks where the middleman network distribution provider had been excepted from holding a licence.

The contractual issues that I have repeatedly raised appear not to have been understood or addressed at all by anyone yet. I will write to you further on these. Meanwhile, of great concern are the revised NEM Metrology Procedures.

I read the Final Determination¹⁰⁵ and feedback from Industry and EAG and was concerned to find that despite much opposition new terminology such as parent and child networks have been introduced and rules changed. These have serious detrimental implication for consumers especially those on low incomes or otherwise disadvantaged.

As an end-user with direct contact with those of particular disadvantage, including a close family member, who has been allegedly unconscionably threatened with disconnection to his hot water services even though his energy supplies for bulk hot water services that are communally heated cannot be measured except by guesstimate through conversion factors; and that he is not and should never be considered contractually obligated to any party, energy supplier or embedded network distributor.

Yet the new NEM Metrology Procedures and its associated deliberative documents¹⁰⁶ seem to allow this. These issues have been the subject of more protracted discussed in previous submissions to the Productivity Commission, to AEMC's Retail Policy Review and other correspondence to AEMC; to the AER, MCE Market Reform team and numerous state and federal bodies.

Under trade measurement provisions albeit that there are some remaining utility exemptions to be lifted, current practices are deemed to be invalid and illegal, so it is just a matter of time before more appropriate arrangements will need to be put in place to measure up, better clarification of contractual obligation, and enhanced consumer protections.

This sort of strategy apparently endorsed by policy will be not give the market much confidence or faith in the system, will create bad blood and angst between consumers and suppliers, and between consumers and regulators or policy-makers; destroy potentially strong and lasting relationships with the consuming public; and have the effect of stripping end users of their enshrined rights, since they normally take on residential tenancy leases not expecting to pay for bulk energy, or other utilities that cannot be individually measured scientifically using appropriate instruments, under protections already afforded to them. More than that they expect their common law rights and rights under the rules of natural and social justice to be upheld also.

¹⁰⁵ NEM Embedded Networks and Retail Competition – Final Determination V1.0 22 August 2007 Prepared for NEM by Strategy Development – adopted in the face of opposition by industry and other participants

¹⁰⁵ National Electricity Market Metrology Procedure PV 1.20 Prepared by NEMMCO- MT OP1985-001 found at <http://www.nemmco.com.au/meteringandretail/640-0139.pdf>

¹⁰⁶ National Electricity Market Metrology Procedure PV 1.20 Prepared by NEMMCO- MT OP1985-001 found at <http://www.nemmco.com.au/meteringandretail/640-0139.pdf>

Whilst the justification put forward for adoption of bizarre conversion factor algorithm calculations allowing measurement of water volume and charging by cents per litre when calculating gas or electricity usage by individuals using bulk hot water, is that this was undertaken to buffer against price shock to low-income end-users, contractually the contract lies with the body corporate once invited onto the premises to fit the metering installation, as it is the body corporate who is the “**relevant customer**” and “**commences to take supply**” at the point at which the gas or electricity leaves the distribution point and enters the outlet of the meter on common property infrastructure.

The apparently bizarre algorithm conversion factor calculations are apparently condoned by the Victorian energy regulator Essential Services Commission without it seems an understanding of some of the fundamentals of contractual law. It could be argued successfully that when a body corporate invites a bulk energy supplier onto a property to fit a bulk gas meter; the metering installation is completed; and water meters installed to calculate individual gas or electricity consumption; such an arrangement between supplier and body corporate constitutes a contract between them to supply energy for heating water tanks communally used by renting tenants in flats and apartment blocks without free-standing property or separate energy meters.

Retailers are licenced to sell gas or electricity but are now appear to be selling water products or heated water, though they do not own the water, and through energy does not pass through the meters theoretically used to measure individual consumption by tenants.

In fact site-specific reading was rejected as an option to inconvenient and expensive to adopt.

Nevertheless, private residential tenants are bearing the brunt of averaged guesstimated calculations of deemed energy consumed that cannot be measured precisely in a scientific way; are deemed to be contractually obligated where the proper contract lies with the body corporate entity (owners corporation), and on the basis that a contract is formed between landlord and supplier at the moment gas is received at the double-custody changeover point at the point at which, in the case of gas, the gas leaves the upstream distribution point and enters the outlet of the meter. A supply charge applies from the moment the infrastructure is in place, so the body corporate “commences to take supply” just as soon as the metering installation is complete after agreement is reached for supply with the supplier.

Public protections in this regard are non-existent, this issue has been a thorn in the side for years and remains unaddressed. All surveys and discussion of competition have conveniently refused to acknowledge the existence of apparently bizarre arrangements that detract not simply from social obligation but from acceptable practices.

Unless energy efficiency devices are fitted, and subsidies provided for older poorly maintained properties to be retro-fitted energy will continue to be wasted, consumer satisfaction levels will remain low and proper obligations and liabilities will remain unaddressed.

To a large extent the existing bulk hot water pricing arrangements based on conversion factors alone that take a doctorate in alternative mathematics to figure out.

The current measurement practices are in contravention of the spirit of existing trade measurement and utility provisions.

Best-practice standards for trade and utility measurement are non-existent for the calculation of levels of consumption of bulk energy for hot water services that are part of the common property infrastructure of body corporate entities (Owners Corporation).

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

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

A person is guilty of an offence if:

(a) the person sells a quantity of gas, electricity or water for a price; and

(b) the price is not a price determined by reference to a measurement of a quantity in the unit of measurement requirement by the regulations

Penalty 50 penalty units

Regulations associated with that Act, viz *National Measurement Regulations Statutory Rules 1999* 110 currently exempt utility meters providing gas and electricity but not cold water meters (with qualifying clauses) in all circumstances, but there are future goals to remove such exemptions when the infrastructure is in place to accommodate such changes.

State legislation in Victoria has not caught up with national standards and provisions, despite the existence of the *Utilities (Metrological Controls) Act 2002 (Victoria)* effective 2003 but without current regulations to match, so impotent for the last four years.

With reference to the *National Measurement Regulations 1999 Statutory Rules 100* (now being updated under 2007 regulations), it could be argued that **unjust measurements** are being applied and unjust pricing formulae (notwithstanding apparent endorsement by the current Victorian energy regulator) and that in principle should apply to:

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

It was recognized at the time that the Bulk Hot Water Guidelines were adopted that these provisions would become invalid and illegal when utility exemptions were lifted. Yet they were adopted in the full knowledge that they contravened the spirit and intent of trade measurement and utility provisions. For further discussion see separate document attached.

All of this is by-the-by, since if there is a single bulk gas meter, the **distribution supply point is at the outlet of the meter** situated on the common property of the Body Corporate infrastructure, and the contract between supplier and Body Corporate commenced when the arrangement is made between those parties to accept bulk gas and to effect the meter installation. A supply charge applies at the time that the infrastructure is in place to accept double custody changeover of supply of gas from the upstream distribution supply point to the outlet of the meter long before any tenant takes up residency.

Since a **relevant customer** in such cases is simply described as one who uses no more than 10GJ per annum of gas, and since this includes some 1.6 million Victorians, and not restricted to a natural person, more especially if the gas (or electricity) consumption cannot be measured with a separate meter, the body corporate is the relevant customer. These arrangements are tantamount to measuring a bar of chocolate in an oil funnel and appear to be unfair contractual” conditions, even if any contract is shown to exist.

The belief was held apparently that by adopting these strange calculation methods, vulnerable and low-income consumers were being shielded from price shock. However, since they are not legally contractually obligated for the reasons described.

Meanwhile there are contractual difficulties since in multi-tenanted dwellings, body corporate entities (owners corporation) are required by law under the Residential Tenancies Act 1997 (Victoria) to accept all charges for utilities that are not individually metered for each component of energy supplied (gas, water electricity) which is not the case where bulk energy is supplied to heat water tanks. In addition, unless water efficient devices are fitted in each apartment, the landlord cannot pass on charges for water, hot or cold.

Though the *Residential Tenancies Act 1997* is not designed to resolve disputes between landlords and tenants and not third parties, the current seemingly bizarre pricing and charging arrangements and confusion over proper interpretation of relevant customer and contractual matters has the effect of making common law contractual rights, fair trading rights and rights under the *Residential Tenancies Act* effectively inaccessible.

Cost recovery exercises through s55 of the *RTA* do not solve the contractual problems or the perception that end-users in this position not properly the contractual party, must provide other contractual obligations such as safe convenient and unhindered access to meters (whether or not suitable instruments to measure energy).

There are concerns about “*embedded network consumers*” in the strict sense of the use of that term. The term normally applies to energy supply obtained from a network other than the original distribution network and on-sold often by unlicensed distributors who have obtained exemptions and therefore escape regulatory control over their practices; but all other types of “*inset consumers*” including those receiving energy used to heat communal bulk hot water services in multi-tenanted dwellings.

Those living in caravan parks, rooming and boarding houses and nursing homes are amongst end-consumers not receiving their proper entitlements and disadvantaged by existing provisions and practices. These are bound to be amongst those where market failure has been demonstrated.

The Essential Services Commission has already granted at least one licence for supply of electricity to “energy only contracts and customers in embedded networks” The terms of the licence granted to Dodo Power and Gas is discussed below.

Momentum Energy who was forced to undertake a distressed sale of some **15,000 unhedged residential customers** in July has plans to enter the billing arena, presumably also impacting on embedded networks (refer to their recent Annual report following the sale of their residential customers, most of them in NSW).

Others are finding this a lucrative business. Some are operating as unlicensed distributors exempt from regulations. There are published reports of charges for up to ten times the rate for consumed energy or deemed consumer energy in these circumstances¹⁰⁷

Though not stated, the term “*energy-only contracts*” applies to those without separate energy meters, presumably using the bulk hot water arrangements in place under Bulk hot Water Guideline 20(1).

Cited below is an extract from the Licence for **Dodo Power and Gas Pty Ltd** ABN 15 123 155 840 to show an example of what is being authorized. We note that this company was not included in the list of providers discussed in the CRA International’s Report or the Wallis Retailers Report for the AEMC Review.

¹⁰⁷ Refer to CUAC Spring Quarterly September 2005 Embedded Networks – Disconnect Customers Article by Tim Brook. Refer to Winters v Buttigeg case before VCAT December 2004 (Docklands apartment)

The arrangements, taken in conjunction with the Bulk Hot Water Pricing and Charging Guideline impact on unilaterally perceived default supply contracts as they specifically affect “energy-only” sale or re-sale for bulk energy supplied without separate meters through which energy can be measured for consumption by individuals.

The same applies to those technically using “**embedded networks**” in which the distribution network is crossed over to another network in the middleman custody change-over. This often applies to those in caravan parks, rooming houses, boarding houses and nursing homes, high rise blocks. These arrangements can also apply to those in caravan parks, rooming houses, boarding houses, nursing homes, public housing, high rise blocks. They can also occur for smaller apartment blocks. Inflated costs on utility charges without controls can signal exploitive practices without accountability since some such distributors can be exempted from energy regulations

The licence implies that it has been provided for middleman sale of electricity.¹⁰⁸

4. ELECTRICITY PURCHASE ARRANGEMENTS

4.1 The *Licensee* must have in place agreements or arrangements for the purchase of electricity through the *wholesale electricity market* or otherwise, and any necessary related *authorisations*, as are required if the *Licensee* is to be able to perform its obligations under contracts for the sale of electricity with *customers*.

4.2 The *Licensee* is deemed to comply with clause 4.1 if it is registered with *NEMMCO* as a ‘Customer’ under the *National Electricity Rules*.

5. ENERGY ONLY CONTRACTS AND CUSTOMERS IN EMBEDDED NETWORKS

5.1 The *Licensee* must not enter into a contract for the sale of electricity with a *relevant customer* unless the contract also provides for the provision or procurement by the *Licensee* of *distribution services*.

5.2 Clause 5.1 does not apply if:

- (a) the *relevant customer* has informed the *Licensee* in writing that the *relevant customer* has entered into an agreement with a licensed *distributor* for the provision of *distribution services*; or
- (b) the *relevant customer* takes an intermediary distribution or supply of electricity (as defined in the *General Exemption Order*) from a *distributor* exempt from the requirement to hold a *distribution licence* under the *General Exemption Order*. However, if this exception applies, the *Licensee* must pay the exempt *distributor* the distribution network charges which would have been charged by the *relevant licensed distributor* in respect of that *customer* if that *customer* were supplied directly by that *relevant licensed distributor* instead of being supplied by the exempt *distributor*.

¹⁰⁸ Dodo Power and Gas Pty Ltd ABN 15 123 155 840 ESC Licence ER 02/20007 [DODO] TRIM C907/1-239

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

The laws of contract are first principle considerations above all else. Such laws cannot simply be cast away in the rush to implement creative competition goals. Goals that fail to consider fairness and social justice principles and serve to perpetuate market failure through unacceptable conduct or even financial collapse of new entrants because of power imbalances will hurt the whole country.

The matters are far from simple. There appears to be proper understanding within the industry at large and especially amongst the regulators of the complexities of contractual law, existing provisions in other enactments or the position that consumers have been placed with systematic and ongoing erosion of their rights at the whim of a regulatory or rule change or at the demand of market participants in the interests of promoting "competition."

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

Though energy suppliers appear not to recognize the range of contractual and trade measurement practices, issues of contract, proper definition of small customers and their rights and protections, including water temperature and maintenance issues appear to have been left unaddressed for far too long. The effect is to attempt to strip consumers of their common law and other rights pursuant to specific legislative provisions.

The opportunity exists with changes to regulations and standardization to have these issues unambiguously spelled out.

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

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

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

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

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

Gas is measured in megajoules (MJ) and electricity in kilowatt-hours (KWh). Gas does not pass through water meters. Water meters are unsuitable instruments for the measurement of energy consumption. Energy retailers are licenced to sell either gas or electricity but not water products.

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

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

Engagement between retailers and customers

The twin Wallis Survey Reports commissioned by the AEMC's Retail Competition Review found that:

“Consumers of all types were approached by retailers, those most likely to be approached owned their own homes or businesses and had electricity and gas connected.

Domestic customers in regional areas and in older age groups were more likely than others to be approached as were businesses employing up to 4 people –especially for electricity.”

Retailers did not differentiate between customers of different types in their marketing efforts. The costs to acquire and retain customers are similar for first and second tier retailers and are significantly higher for business customers.

Not surprisingly, in-depth interviews suggested that most retailers are focussing on the domestic segment of the market. The profile of the ideal customer within this segment is:

A household that consumes a lot of energy; and

Has the capacity to pay bills.

This has led them to target suburbs where larger houses with high consuming appliances are likely to be found. This is especially the case for second tier retailers who are building their customer bases.

The heavy reliance on door-knocking to generate sales introduces an additional bias away from types of housing where access is difficult, for example townhouses, flats, apartments and units with centralised security. These types of housing are not being discriminated against, per se.

Door knocking and telesales are the main sales channels used by all retailers to contact customers. Above the line advertising methods are rated as the least efficient in terms of their effectiveness per dollar spent in this market. Retailers use a range of sales channels to inform customers of their terms and conditions, tariffs and any non-price based incentives and offers. The internet is the most widely used information dissemination tool.”

The characteristics of businesses are slightly easier to determine and retailers are aware that some types of industry use more energy than others. Several retailers specialize in selling to the business market and they use similar principles to the domestic market (e. g anticipated consumption and location) to target their sales efforts.

COMMENT

It is of concern that retailers have become discerning about which customers they will target. The risk of those on low fixed incomes being neglected and compromised in the impending free-for-all climate are high. The consumer protection framework needs to be solid, affordable and accessible however that is structured under a national framework. None of this is in place yet and the draft report not ready for some time.

Customer choice and behaviour:

Take up of contracts:

Survey Findings:

Retailers agree that many customers do not know the terms and conditions of their contracts in detail or even the name of their supplier, owing to lack of interest, not lack of information.

Customers on standing offers remain with their known retailer because of the relationship and service they have received.

Customers do not refer to many information sources when deciding which company to buy energy from with most taking information given by retailers at face value.

Retailers are of a view that energy is a low involvement product and consumers are not interested in seeking market offers for electricity and gas. Therefore to keep the market active retailers adopt strategies by proactively approaching customers.”

“Door knocking and telesales are the main sales channels used by all retailers to contact customers. Above the line advertising methods are rated as the least efficient in terms of their effectiveness per dollar spent in this market. Retailers use a range of sales channels to inform customers of their terms and conditions, tariffs and any non-price based incentives and offers. The internet is the most widely used information dissemination tool.”

“Retailers believe that customers will switch if they are offered immediate price benefits, green energy, flexible payment options and, more particularly amongst the business segment, guaranteed prices for a set period. Customers will remain with retailers for demonstrated customer service.”

Comment:

It is of great concern that the implied presumption is that anything goes and as put by CUAC in their October Quarterly: an informed customer is anyone who opens the door.

Yet complicated contractual terms and other barriers to understanding and assessing comparative contracts appear to act as barriers to many, who frequently end up with dissonance over a change. Many are not aware that most Greenenergy packages will add up to \$450 to their annual bill or around \$5-\$7 weekly. Two energy suppliers charge nothing for the first 10% but there is always a higher cost after that level, and for some a fairly significant part of a fixed low income budget.

The consumer survey confirmed the following:

“The majority of customers do not plan to switch retailer in the next year because they have a contract, like their current retailer or do not perceive it to be worth the effort.

The majority also supports the ability to choose their energy retailer.

The existence of choice does not by any means guarantee change. Retailers know that they have to woo customers to achieve the switches, and also have certain sub-sets in mind to target.

The combined submission to AEMC’s Review from Footscray Community Legal Centre and Financial Counselling Services Inc. and Essendon Community Legal Centre Inc¹⁰⁹ had in the previous 12 months collated

“Casework studies by both centres, indicated “a lack of consumer awareness about the status of ‘deemed’ “standing offer” ‘default’ or “market contracts.”

These organizations also noted that

“consumers appear to lack awareness of their legal contractual obligations when ‘switching’ retailers’.

That survey data, obtained on **21 June 2007**, by the two Community Legal Centres named, in association with the CUAC and Tenants Union of Victoria was based on tenants of local housing estates, and therefore would not have included those imposed with alleged “deemed contract” status that related to bulk energy provision, since two separate arrangements exist for residential tenants receiving bulk energy supplies not individually meters with either gas or electricity meters, but who are all the same charged for energy on the basis of imprecise algorithm calculations.

In the case of housing estate residents, the Department of Human Services or delegate willingly accepts body corporate status and combined bills for housing estates tenants. These bodies are the only ones permitted to make direct arrangements based on a flat rate chargeable without the benefit of meter reading, which cost is passed on as a service charge to such tenants.

¹⁰⁹ AEMC Review of Retail Competition Response to Issues Paper, Footscray Legal Centre and Essendon Community Legal Centre 28 June 2007

Industry-Specific Complaints Scheme

Wallis Retailer Surveyor found that

“All retailers had an opinion of the Energy and Water Ombudsman of Victoria complaints handling scheme. While all supported it in concept there is a general belief that the scheme takes the side of the customer too often – rather than arbitrate matters.

The largest number of complaints reported by retailers related to affordability followed by billing, marketing and the transfer process.”

Comment

It is interesting that the retailers have an opinion so discrepant to many customers regarding the proper handling of complaints by the industry-specific scheme, Energy and Water Ombudsman (EWOV), especially for the management of complex complaints.

Though in the case of simple billing, connection and reconnection problems, these issues may well be swiftly and appropriately handled.

However, with the more complex issues the opinions of bias and in which direction these are perceived by retailers and customers may be quite polarized.

As far back as 2004 The Energy Action Group had undertaken an FOI of Essential Services Commission documentation, writing and had written frankly about the issues of transparency cooperation and consumer protection issues in their report of September 2007. Please see below an extract from EAG’s Report in examining the attitude of the ESC, the total lack of triangulation in reviews of its own reporting performance and the perceived gaps in EWOV's performance and reporting.

I quote directly below from the full report also for immediate reference as a public domain document and with the author’s permission a complete copy of the report also as an attachment:

Apparently however, EWOV can make 7 Decisions and could have exercised this power to send a very sharp signal to retailers that non-compliance would not be tolerated. EWOV had only made one such decision (as at 2004) according to a report published by the Energy Action Group discussed below.

Energy Action Group raised the issues of transparency, accountability and cooperation as follows:

“The ESC has reviewed its performance monitoring and reporting processes, to assess the adequacy of its current hardship and affordability performance indicators. However, 'performance auditing' audits the systems (i. e. policy and procedures) the retailers have in place not their actual performance.”

In terms of ESC performance reporting, data is collected from the retailers.

No attempt is made to triangulate by obtaining data directly from customers.

Data provided by community organizations has been ignored.”

Discussion

"The EWOV can make Binding Decisions and could have exercised this power to send a very sharp signal to retailers that non-compliance would not be tolerated. Instead only one such decision has been made, and FCRC (Sharam 2004) reports that taking complaints to the EWOV frequently leaves the customer in the position of having an unaffordable installment plan. The EWOV also has a MOU

(see http://www.esc.vic.gov.au/apps/page/user/pdf/MOU_EWOV_Nov03.pdf

with the ESC that it could have used to prompt the ESC into addressing the issue appropriately. It has not used the dispute resolution mechanism available in the MOU. It is also worth commenting that despite EWOV's efforts to bring this systemic issue to the attention of the ESC, EWOV has not been consistent in its reporting. A more robust identification of the issue as 'systemic' and linkage to retailer non-compliance with the Retail Codes may have assisted in prompting the ESC to act.

"The EWOV also may have bought the regulators lack of action more pointedly to the attention of the public and the Victorian government. A regulatory failure of this scale and duration clearly requires action."

I remain concerned that informed advice is provided to the public and informed decisions made regarding consumer rights and entitlements especially in complex legal and technical matters such as this one, with policy components and cross-jurisdictional boundaries.

The other issue of concern is the extraordinary limitations of **EWOV** in terms of policy, codes, tariffs, and the like, the public is led to believe that **EWOV** had wide powers of investigation, recommendation and referral, which I felt should have been used by now to the full extent allowable in this case and in the public interest so that consumer rights were not further compromised. The goal of achieving conciliation at all conceivable costs should not dictate the proper management any matter before an industry-specific complaints scheme.

Apparently, the existing Victorian energy-specific industry-based complaints scheme **EWOV**, funded, run and managed by industry participants is debarred under its charter from undertaking any of the following tasks:

- The setting of prices and tariffs
- Commercial activities outside of an energy or water provider's licence or core business
- The content of Government policies, legislation, licences and codes
- Complaints which are being or have been considered by a court or tribunal
- Any matter specifically required by legislation
- Customer contributions to the cost of capital works bearing in mind current law and reasonable and relevant industry practice
- Actions taken by an energy or water provider and their consequence
- Actions taken at the direction of a person or entity having regulatory or administrative power

This means very limited powers of investigation and recommendation. In fact it is very difficult to know just what this body can do and who has overall control regulatory on policy design issues. Is it the Essential Services Commission or the Department of Primary Industries?

On studying the above list it is extremely difficult to determine just what **EWOV** can achieve beyond clear-cut wrongful disconnection cases where financial hardship exists or there are simple billing enquiries.

I venture to express the view that an industry-specific complaints scheme funded, run and managed by market participants may not always be seen by the public as being optimally objective and free of conflicts of interest. Section 36 of the *Gas Industry Act 2001* covers such a concern.

In the new consumer protection framework, one would hope that more distance will be achievable so that industry schemes are neither too close to the regulator nor to the market participants and in a far better position to take an impartial view within a well-funded framework with top leadership and adequate funding to cover a range of consumer needs.

A GLIMPSE OF ASPECTS THE MICRO AND MACRO ENVIRIONMENT

Certain matters of concern are on the public record impacting on marketing conduct and anti-competition conduct generally and on the energy industry as a whole. These concerns are not limited to one company or area of interest, but recent reports that are readily accessible are cited below.

Anti-competition behaviour cannot be viewed in a microcosm since the nature of the energy business requires a broader view to be taken by all players in the market, whether retailers, gentailers, distributors or network infrastructure participants.

None of this activity encourages faith in stability of the energy market; in compliance likelihood or public confidence in future compliance; or of acceptable conduct parameters. There may be theoretical room to improve competition by deregulation, but will this be justified at this time, undertaken in relative haste, without all possible community consultations undertaken with proper notice and at the proper leisure that would normally be required before such a major step is proposed and adopted?

Of course the dye may be already cast. If that is the case, perhaps the public needs to send for band-aid reinforcements and have them on stand-by.

Other key issues include **mergers, acquisitions, integrations, vertical and horizontal; market power imbalance; unfair contracts; conduct issues**, including misleading and unconscionable behaviours; emphasis on vulnerable and disadvantaged consumer niche group.

The predicted price rises up to 40% are extremely worrying.

Analyst Amro Morgans Reported on 17 May 2007¹¹⁰

“A recent approval by IPART to allow increases in NSW electricity prices in the order of 30% over the next three years”

Independent rivalry and the behaviour of retailers

Operating Arrangements

Wallis Retailer Survey findings:

“Most companies operate in other jurisdictions. This is a diversification and risk mitigation strategy as well as offering economies of scale. This is important to all retailers. First tier retailers tend to manage all systems and services in-house.

Second tier retailers that operate in many jurisdictions do the same, as they can amortize their costs across Australia. Second tier (niche) retailers with smaller customer bases are more likely to use an outsourcing model for parts of their operations including IT, telemarketing, sales and billing.”

CUAC has already expressed concern that the market is not yet sufficiently mature to rely on competition to provide adequate protection to consumers, and has also expressed concerns that market conduct remains a real problem and residential consumers do not (and are unlikely ever to have) real bargaining power.^{111 112}

¹¹⁰ Investor Report AMRO Morgans 17 May 2007 found at <http://www.Jackgreen.com.au/investor.php>

¹¹¹ Connors, K. CUAC Executive Officer. The end of price regulation in Victoria? The CUAC Qrterly, p 3-4

¹¹² AEMC Retail Competition Review – CUAC and collective agency Response to Issues Paper p.2

The **Consumer Law Action Centre (CLAC)** has discussed the issues of marketplace rivalry and behaviour and the role and impact on price regulation.

The only thing to add to this is that the position of customers without any choice at all because of unilaterally and inappropriately imposed “**deemed contract status**” for those receiving bulk energy for the heating of communal hot water tanks in residential accommodation.

This is a consistent gap that I hope to be given a chance to address from my personal knowledge of the issues and impacts on a significant proportion of the community in residential accommodation.

Other organizations have drawn similar conclusions about the position in Victoria including CUAC and CALV.

The **Consumer Law Action Centre (CLAC)** has referred to many instances of misleading conduct and unfair contract provisions.¹¹³ I can add much anecdotal comment to support that view.

The **Tenants Union of Victoria (TUV)**¹¹⁴ has expressed concerns that economic regulators have valued competition over consumer protection in developing markets for energy and telephone services.

Many agencies, including the Tenants’ Union have referred to **market power issues, anti-competitive or misleading conduct**, many reflecting the exercise of market power, information problems and complex sales transactions.

I could not agree more with the perceptions of CUAC¹¹⁵ that

“There is clearly enough evidence of ongoing anti-competitive and misleading behaviour to demonstrate the need for robust consumer protection to provide some assurance that consumers enter into contracts with their explicit informed consent, understanding the tariff, terms and conditions attached to that product.”

Besides submitting that the market is not yet mature enough to rely on competition to provide adequate protection to consumers, the **CUAC** submissions¹¹⁶, endorsed by other community organisations discusses impediments to effective competition on both the supply and demand sides.

The previous submission to the **AEMC Draft Statement** by a group of consumer organizations that included **CUAC, Victorian Council of Social Services (VCOSS), Alternative Technology Association (ATA) and St Vincent de Paul Society Victoria** provided similar data and suggestions in terms of the value of a more in-depth evaluation of the marketplace, consumer behaviour and productivity impacts.¹¹⁷

¹¹³ Consumer Law Action Centre (CALV) Submission to ESC Early Termination Fees Compliance Review – Draft Decision 28 August 2006

¹¹⁴ AEMC Review of Retail Competition – TUV Response to Issues Paper, July 2007. p9

¹¹⁵ AMEC Review of Retail Competition – CUAC’s response, 10 April 2007 p5

¹¹⁶ Ibid CUAC Response. Also Connors, K, “The end of price regulation in Victoria? The CUAC Quarterly, July 07 p4

¹¹⁷ Collective Community Response to AEMC Draft Statement, dated 11 April 2007,. That submission represented the views of the Consumer Utilities Advocacy Centre Ltd, Victorian Council of Social Service, Alternative Technology Association, and St Vincent de Paul Society Victoria, p5 and 6

If thorough longitudinal surveys have not to date been conducted; if sub-segmentation has not yet addressed consumer behaviour patterns of particular consumer groups, for example, residential tenants, and perhaps in particular those with vulnerability and disadvantage in the broadest context of definition, as for example embraced by Consumer Affairs Victoria¹¹⁸, viz “vulnerable consumer” as:

“a person who is capable of readily or quickly suffering detriment in the process of consumption”

With good reason, CUAC has cautioned the Commission against shifting responsibility from retailer to the community sector through changes to the safety net.¹¹⁹

Issues of explicit informed consent misleading conduct, economic coercion and unfair contractual terms are germane to the more narrowly focused issues that I wish to raise in more detail a future submission, but they apply generally also as evidenced in the many consumer submissions already published by AEMC and the Productivity Commission, and already known to the **Essential Services Commission**, the **Energy and Water Ombudsman** and others.

First-tier gentailers

The Wallis Retailer Survey’s brief profile of the retail market leaves out many pertinent considerations, though it is helpful to learn of retailer perspectives. It reports that:

“At the time of the survey thirteen licensed retailers sell electricity to domestic and small business customers in the Victorian market. Six of these retailers are licensed to sell gas as well. Three of these companies, AGL, Origin and TRUenergy have been providing electricity and gas to Victorian homes and businesses since the start of full retail competition.

*They are referred to as first tier retailers in this Report. At January 2002 all electricity and gas customers therefore had an account with one of these three.*¹²⁰

The other, second tier retailers, have entered the market place since January 2002. Most retailers operate in more than one Australian state.

The Wallis Retailer Report clarified that all companies offered green energy and one exclusively – clearly Jackgreen.

A single sentence about ownership of the retailers is covered by the comment that

“ownership of the retailers also varies from public listed companies to privately owned firms to government-owned enterprises.”

The report also stated that most are owned by Australian interests, without clarifying how that should be interpreted. The Report terms a “business customer” as business consumer up to 160 MWh per annum of electricity and 5TJ per annum of gas.

¹¹⁸ Consumer Affairs Victoria (CAV) Discussion Paper *What do we mean by ‘vulnerable’ and disadvantaged consumers?*, 2004, p 1, available at [http://www.consumer.vic.gov.au/CA256902000FE154/Lookup/CAV_Publications_Reports_and_Guidelines/\\$file/vulnerabledisadvantaged.pdf](http://www.consumer.vic.gov.au/CA256902000FE154/Lookup/CAV_Publications_Reports_and_Guidelines/$file/vulnerabledisadvantaged.pdf)

¹¹⁹ Submission “AEMC Retail Competition Review – CUAC Response to Issues Paper” 10 July 2007

¹²⁰ Wallis Retailer Survey Commissioned for the AEMC’s Retail Competition Review October 2007

These cursory facts are useful, but they do not analyse in context the history of **mergers, acquisitions, ownership and cross-ownership**, sometimes not quite as obvious, nor does it speak of off-shore interests and ownership; the impact of the plans and perceptions of the parent companies, and the complex way in which even the three first-tier retailers have joined forces in offering novel asset management services to distributors, the impacts of the load growth factors; impacts of pricing.

Singularly missing is a SWOT analysis of the market to include internal or external threats, any missing factors in the **internal market**.

Admittedly the Wallis survey was intended merely as a survey of retailer perceptions, just as the consumer survey was designed out of the context of the whole market or the context of behavioural economics, to interpret switching behaviour and to interpret alleged indifference to the market by consumers; likely responses to product packages and incentives or engagement with the concept of differentiation between retailers.

Quantitative data about the interstate operations of Victorian retailers is provided only, but no analysis of how these operations and growth factors may be impacted in one state when the same company has to contend with hedge provisions in several states to manage risk. Neither does there appear to be an analysis of market growth parameters or how vertical or horizontal factors inter-relate.

These simple facts are provided in the Wallis Report about interstate operational parameters:

“None of the second tier retailers who are licensed to sell both electricity and gas in Victoria operates in the ACT. The niche retailers, as their name suggests, operate more widely across the country when considered as a group. Between them they are operating in every state where energy retail markets are contestable.

All retailers are making market offers for electricity to every part of Victoria as reference to Table 2 shows. While market contracts are on offer in every part of the state for gas, the number of retailers offering them varies from 2 in the North West, to a maximum of 5 in all areas, mentioning that at the time of the study one retailer licensed to sell gas in Victoria was not doing so.

Whilst recognizing that the twin quantitative surveys and little more than that, most information about market structure, ownership, cross-ownership, integration parameters, overseas interests or control and the like is readily and publicly available online for perusal and notation by anyone who is sufficiently interested.”

Because of some of these perceived gaps, I have taken the time to provide more detailed factual information about market in general with particular **focus on ownership and operating models and the convoluted history of mergers and acquisitions**, that may by some be interpreted as signs of consolidation, and by others as an unstable and unpredictable market that is far from mature or stabilized.

One example of an interesting asset management arrangement was the Origin Energy Asset Portfolio known as OEAM comprising Origin Energy, AGL and TRUenergy, and serving Envestra, Australia’s largest distributor as an Asset Management team and working harmoniously together. Alinta, now taken over by the Babcock and Brown and Singapore Power Consortium (SP).

Origin Energy sold off its OEAM asset management portfolio to APA in July, who then acquired the same role serving Envestra, and contracted to manage all assets, whilst at the same time owning shares.

These factors do doubt have impacts, if only perceptual on, on the confidence of new entrants to capture a small share of the market. Many of the second-tier players cannot afford to manage the risk associated with dealing with the distributors, but have to resort to other strategies to secure a position where they feel least threatened.

The role of retailers after all is primarily to manage risk. Price-setting is at the beginning of the distribution chain; load growth factors are crucial to examining the whole market; and economic policy that is limited to commercial competition goals is lop-sided. I have neither the time nor the expertise to analyse these factors, but in passing provide later in this document some interesting references and literature view pointers to some of the gaps that may be usefully bridged in examining the missing links in the internal market

The additional information is provided in good faith in order to provide a more detailed understanding of the market structure better and the impact of mergers and acquisitions and vertical integration on market stability. Some of these factual details are provided below without comment on possible impacts on the market and on competition goals in particular.

The convoluted history of cross-ownership and some of the novel asset management schemes that link retailers, gentailers, management schemes and distributors gives rise to wondering whether privatization and full deregulation where things will lead and whether there is need to be concerned about monopolistic anti-competitive behaviour that may serve to drive out newcomers into the market.

The purpose of providing this material is not to give a history lesson, but to provide data that may be useful in the overall analysis of the market and its readiness at this point in time in the midst of confusion and uncertainty with major regulatory change for this last step in the deregulation process – that of price deregulation and considerable lightening of the regulatory burden as a green light for an “anything goes policy as long as we have informed the customer, even if understanding and enlighten decision-making cannot be guaranteed.

In the late 1990s Victoria split the Gas and Fuel Corporation into three separate retail businesses, each linked to a distribution network area, and sold each to different interests – Utilicorp and MAP Society (operating as United Energy and Pulse Energy), TXU and Origin Energy.

Two of the businesses have since changed hands.

AGL acquired the former United Energy business in 2002

TXU (Australia) now TRUenergy sold its retail interests to Singapore Power in 2004, which in turn sold the business to China Lighting and Power in 2005. The new owners rebadged TXU as TRUenergy. TRUenergy also owns EasternEnergy, the latter being the name on the 2006 published Constitution of the energy-specific complaints scheme.

The three first-tier local retailers TRUenergy, AGL and Origin Energy each account for around a third of the market share.

The Wallis Survey identified the perception of retailers that vertical integration with generation was considered to be the most important structural feature of the market for gas and electricity, especially by second tier retailers.

It is understandable that retailers would see vertical integration with generation as the most important structural feature of the market for gas and electricity, more so from the standpoint of second-tier retailers. This was confirmed by the Wallis Report’s feedback from retailers. Retailers apparently did not rate vertical integration with energy distribution to be at all important.

Before looking at second-tier retailer perspectives perhaps it is important to touch on the impacts of vertical expansion or vertical acquisition on market stability, market dominance and share and how this might affect second-tier retailers.

Vertical expansion or vertical acquisition

Though this Review by AEMC is focused on competition impacts on the gas and electricity markets, it is necessary to gain an understanding of the wider picture in a frenzied climate of mergers and acquisitions poor compliance with legislative provisions concerning anti-competitive and other conduct.

The Energy Action Group (EAG) has already made astute observations about the marketplace, mergers, acquisitions, and disclosure behaviour by market participants.

CALC has suggested that vertical integration may have its strengths in enhancing competition.

It would seem that all forms of integration are in regular use now within the energy industry and that some of these practices may be seen to be anti-competitive, based on these basic definitions of the various forms of commercial integration, and without examining the literature on the subject and welfare impacts on consumers on the economy, though there is much available material on these subjects on those with the time and expertise to pursue it.

Definitions (Encarta English UK)

Forward vertical integration: the integration of one company with another company whose product represents a later stage in the chain of production.

Backward vertical integration: the integration of one company with another company whose product represents an earlier stage in the chain of production.

Horizontal vertical integration: a merger or takeover between two or more companies with the same business activities.

Wikipedia,¹²¹ offers some simple microeconomic guidelines which may helpful to those wishing to probe further. The considerations below taken either verbatim or paraphrased from Wikipedia with the main cited reference being :

*“The term vertical integration describes a style of ownership and control. The degree to which a firm owns its upstream suppliers and downstream buyers determines how vertically integrated it is.”*¹²²

Companies structured in this way are united through a hierarchy and share a common owner, with each member producing a different product or service, combining to satisfy a common need. There is no question that this is occurring in the energy industry.

This is contrasted against horizontal integration which involves merger or takeover between two or more companies with the same business activities (this is certainly occurring in the energy industry between retailers.

¹²¹ Wikipedia, main reference Perry, M. K. “Vertical Integration: determinants and effects” Chapter 3 in Handbook of Industrial organization. North Holland, 1988

¹²² Martin K Perry “Vertical Integration: Determinants and Effects” Chapter 3 in Handbook of Industrial organization. North Holland, 1988 c/f Wikipedia.

Market participants would see the term cartel as a softer term to monopoly, which is what is often produced through vertical integration. Certainly it could lead to consolidation and avoid hold-up problems.

Carnegie Steel is an example of vertical integration, where the company controlled not only the mills where the steel was manufactured, but also the mines where the iron ore was extracted, the coal mines that supplied the coal, the shops that transported the iron ore and the railroads that transported the coal to the factor, the coke ovens where the coal was coked, etc. Later on, Carnegie even established an institute of higher learning to teach the steel processes to the next generation.

Wikipedia cites the oil industry as one of the best examples of vertical integration at both multinational and national levels (ExxonMobil, Royal DutchShell; BP, active all the way along the supply chain).

The term vertical acquisition or expansion relates to acquisition of companies producing the intermediate goods needed by the business or help market to market and distribute its final goods. This secures the supplies needed by the firm to produce its product and the market needed to sell the product resulting in more efficient business and lower costs and more profits.

This technique is often used to gain market power. The acquisition of DirectTV by News Corporation is such an example. DirectTV is a satellite TV company through which News Corporation can distribute more of its media content: news, movies and TV shows.

Such conduct has also been observed lately within the energy industry.

CUAC has predicted enhanced predatory conduct if deregulation occurs. Perhaps we should be more concerned about securing compliance whilst regulation is in place than hoping for it once all fetters are released. The ACCC is having a tough enough time with enforcement as it is, and so is the CAV.

No assessment of the retail market and competition impacts can be made without reference to and understanding of the remainder of the utilities infrastructure – the distributors, network transmitters and the generators, to say nothing of the asset management groups actually taking day-to-day operating responsibility, right down to meter reading. A robust examination of the entire market is crucial to examining the pros and cons of deregulation within the retail utility sector.

The musical chairs pageant has been watched by many too dizzy to make sense quickly enough of the implications of the rapidity of change and the multiple vertical integrations that have resulted. As suggested by ABC Interviewer Anthony Kohler¹²³, but from all appearances, not only does the scene appear to be

“set for a new round of takeovers in the Australian energy business” but the set-change does not seem to be on the agenda at all

A good many of the players are safely under the wing of major off-shore owners, either **Babcock and Brown Infrastructure** (managed by Babcock and Brown) and consortium partner **Singapore Power; Cheung Kong Infrastructure Holdings (CKI or the Group)**, to **China Lighting and Power** (CLP, parent copy for TRUenergy, a wholly owned Hong Kong company listed on the Hong Kong stock exchange).

¹²³ ABC Interview Inside Business Interview between Alan Kohler and Paul Anthony CEO of AGL 22 April 2007.

The Sydney Morning Herald reported on 29 August 2007¹²⁴ that **Babcock and Brown Infrastructure** (BBI) is on an acquisition trail that could lead to spending more than \$2 billion on acquisitions after reporting growth in earnings before interest, tax, depreciation and amortization of 43% to \$513 million.

BBI's net profit after tax of \$113 million, was up 92 per cent on the previous year, boosted by a one-off \$59 million profit from the sale of two power stations and shares in Babcock & Brown Wind Partners, and a \$51 million income tax benefit.

There appear to be no limits to BBI's ambitions. The company's chief financial officer has reported \$650 million on cash on the company's balance sheet. This is partly made up of capital raised for the North Western purchase, and partly from funding arrangements for the Alinta acquisition. This could represent at least \$2 billion for acquisitions. Apparently in infrastructure trusts, analysts generally rely on cash flows to measure the business's performance (represented by the earnings result), rather than the net profit amount.

The Dampier-to-Bunbury pipeline has been acquired by BBI as a result of the Alinta acquisition. Management agreement for that pipeline are being negotiated between AMP and Macquarie Bank's DUET.

The Alinta deal had been coveted by Macquarie Bank, who lost out to the B&B-Singapore Power consortium. APA shares were part of the distribution parcel.¹²⁵

APA has replaced the Origin Energy-TRUenergy-AGL Consortium (OEAM) as the Asset Managing contractor for Envestra, Australia's largest distributor, with APA and CKI as major shareholders.

The pressure for the NSW Government to sell all government-owned electricity retailers will have its impacts. The private sector is using its maximal bargaining power for deregulation of the retail sector with a review of retail price controls by 2010.¹²⁶

The pressures of the Owen Report and the publicity that it has received, are issues to take into account.¹²⁷

Refer to Premier's press Release Inquiry Announcement¹²⁸

The Owen Report has received its share of criticism. See for example the views expressed by Total Environment Centre spokesman Jeff Angel who suggests that an energy efficiency plan is needed before any decisions are made about future base load power stations¹²⁹

The Queensland Government have completed the sale of its retail electricity assets in January for about \$1.2 billion, while generation assets have already been privatised or leased out in Victoria and South Australia.¹³⁰

¹²⁴ Sydney Morning Herald 29 August 2007 B&B Infrastructure on acquisition trail. Reporter Stuart Washington.

¹²⁵ The Australian Business 5 April 2007 No end to sniping in the standoff between Alinta and Macquarie. Brian Firth Reporter

¹²⁶ The Australian Business 12 September 2007 Privatisation Energy Section "A Priority." Matthew Warren, Environmental Writer.

¹²⁷ The Australian, Business 12 September Time to switch back to old power point" Reporter Adele Ferguson

¹²⁸ Secure "NSW energy needs – finding the balance" – advice on NSW Govt potential need for new baseload power station <http://www.premiers.nsw.gov.au/NR/rdonlyres/B50F3E59-8672-4B76-A14F-8BEBF01EA596/0/app1.pdf>

¹²⁹ Owen Report – see Total Environment Centre website and Secure "NSW energy needs – finding the balance" – advice on NSW Govt potential need for new baseload power station <http://www.premiers.nsw.gov.au/NR/rdonlyres/B50F3E59-8672-4B76-A14F-8BEBF01EA596/0/app1.pdf>

Recent developments have kept two stocks in the limelight, AGL and Alinta. Changes for highly regulated stances to deregulation will have far reaching impacts, many possibly irreversible. See for example the predictions of The Intelligent Investor¹³¹.

If deregulation becomes inevitable, there will be significant impacts on the community and on the market itself. It has been suggested that this is an immature and unstable market. Is there room for smaller retailers to compete and what responsibility does the community have to those brave enough to venture in the face of the dominance of the three major retailers who have cornered the market.

In April 2007 *Standards and Poor* had reported¹³² that in general, M&A activity across the Australian utilities sector continues to be characterized by acquisitive company strategies, high asset prices, and highly leveraged transactions. While all segments of the industry are participating in some form of rationalization or consolidation, Standard & Poor's remains concerned about integration risks, the high level of capital expenditures, and the ability of acquirers to service debt loads.

What protections will smaller retailers, and the general consumer population be offered and how carefully will this be considered?¹³³

The sad tale of the collapse of EnergyOne, with the first Retailer of Last Resort outcome is a lesson to learn by. That outcome, as observed by CUAC, may have more to do with management issues than competition factors.

Swapping of assets has become the norm¹³⁴. In such a climate one has to wonder how smaller retailers and newcomers will survive.

This pattern of business conduct and operation is evident in a brief glimpse of the infrastructure diversification that is being undertaken within the energy industry, with many parent companies¹³⁵ such as the following:

Babcock/Brown-Singapore consortium who have been so busy lately with acquisitions (see the Alinta case, SP Ausnet, others);

Cheong Kong Infrastructure Holdings (Envestra, ETSA Utilities, Powercor and CitiPower Spark Infrastructure Group; Lane Cove Tunnel, Aqua Tower; Northern Gas Networks UK, Cambridge Water UK; related infrastructure interests, including construction, asphalt, cement and a limestone quarry (Phillipines).

China Lighting and Power (CLP) (trading as TRUenergy in Australia), with its strong partnership with Hong Kong Electrics and the CLP Holdings Group.

The CLP Group's infrastructure interests include CLP Engineering Limited (CLPE) is a wholly-owned subsidiary of the CLP Group, facility management, public lighting, infrastructure electrical management and research.

¹³⁰ ABC News 11 September 2007 7.24 PM AEST <http://www.abc.net.au/news/stories/2007/09/11/2030267.htm>

¹³¹ The Intelligent Investor Publishing Pty Ltd

¹³² Standards and Poor Report April 2007 Will Mother Nature Dampen The Credit Quality of Australia's Power Players

¹³³ NSW Privatized Electricity Report Flawed [SOURCE](#)

¹³⁴ The Age Business 11 September 2007 "AGL Energy interested in Qld, NSW assets

¹³⁵ See also further discussion later in this document relating to parent companies and affiliations and their offspring or other affiliations operating in Australia

APA's activities as a subcontractor to Envestra using the same asset managing style as Alinta Asset Management.

APA Group had been active in recent months purchasing other regulated assets, such as Allgas (purchased from Energex, Queensland gas distribution network) and GasNet Australia (Operations) Pty Ltd. (BBB/WatchNeg/--) and the 17% shareholding in Envestra Ltd. (BBB-/Stable/A-3) sold by Origin Energy.

Gains and losses with vertical integration are identified in the discussion include internal (affecting the integrated companies) and external, with society-wide, differing according to the state of technology in the industries involved and corresponding with the industry lifecycle.

AGL is experiencing the impact of some of the losses described through substantial market loss of some 41,000 customers overall, despite being a strong player in the retail area.¹³⁶

The loss:benefit ratio with the simplest vertical integration scenario is demonstrated by static technology – which is been more extensively studied than other cases.

The Internal gains include lower transaction costs; synchronization of supply and demand along the chain of products; lower uncertainty and high investment; the ability to monopolize markets throughout the chain by market foreclosure.

The internal losses include higher monetary and organizational costs of switching to other suppliers/buyers.

Society benefits include better opportunities for investment growth through reduced uncertainty, whilst losses include monopolization of markets; rigid organizational structure, such as the shortcomings of socialist economy (c/f John Kenneth Galbraith's work).

The downside of vertical integration is visible with dynamic technology which many believe will eventually hurt a company because when new technologies are available, the company is forced to reinvest in its infrastructures in order to keep up with the competition. It is believed that when technologies evolve very quickly this can cause a company to invest into new technologies, only to reinvest into even newer technologies later, thus carrying a significant financial loss – and impacting again on prices.

On the plus side, all components that are in a company product will work harmoniously, which will lower downtime and repair costs.

Here's a brief cautionary tale to illustrate how unstable the market is focusing on one of the "three musketeers" among the vertically integrated first-tier gentailers currently dominating the market:

April 2007 Standards and Poor

"The Queensland government's sale of two of its three electricity retail businesses hasn't been a catalyst for new entrants into Australia's electricity retail market, but has served to highlight the consolidation occurring in this sector. The acquisition by Origin Energy of Sun Retail and AGL Energy of Powerdirect Australia Pty Ltd. (BBB/Stable/--) serves to further entrench the dominant positions of these two private companies and to a lesser extent CLP Australia Holdings Pty Ltd's (A-/Stable/--) TRUenergy.

The Australian retail market is now even more characterized by these three large players, some mid-market government-owned retail businesses (generally in those states yet to undertake privatization), and a number of small niche players that typically promote a "green" solution.

¹³⁶ Sydney Morning Herald 22 August 2007 AGL Energy posts customer losses

*The recent asset swap of the Torrens Island power stations and Hallet power plant between AGL Energy and CLP Australia helps each entity to better manage their retail exposure in the State of South Australia. Origin Energy's investment in Envestra Ltd. (BBB-/Stable/A-3) and its asset-management business was always seen as noncore, and its exit from these businesses further reinforces that.*¹³⁷

14 July 2007 SMH

The Sydney Morning Herald announced on 14 July 2007¹³⁸ that AGL had secured a new pipeline deal with Epic Energy. This will allow the construction of a \$140 million gas pipeline to complete the final link between the eastern gas markets.

AGL Energy CEO Paul Anthony, who was replaced by Michael Fraser in mid-October 2007,¹³⁹ has confirmed that:

"The agreement would introduce new competitive sources of gas into the NSW the NSW, Southern Australia and Mt Isa gas markets, helping the gas-fired power generation growth and also securing supply into all eastern states by reducing its exposure to supply interruptions."

Mr. Anthony is quoted as saying

"the pipeline initiative was possible following the recent upstream and downstream investments made by AGL - the acquisition of a 27.6 per cent stake in QGC in conjunction with entering into a 20-year gas contract, after the acquisition of the Torrens Island Power Station in South Australia"

11 September The Age

"AGL Energy bought Sun Gas and Powerdirect in Queensland earlier this year, and underwent a \$6.8 billion merger and subsequent demerger from Alinta Ltd in October 2006.

Under that deal, Alinta acquired AGL's infrastructure business, Agility, for \$6.45 billion, and AGL took an initial 33 per cent of Alinta's Western Australian retail and co-generation business."

AGL Energy Ltd, Australia's biggest gas and power retailer, says it would be interested in some or all of Queensland-based Enertrade's business, as well as energy assets in NSW, should they be privatized by the NSW government. AGL Energy managing director Paul Anthony said the utility was not expecting to be as active this financial year on the merger and acquisition front as it had been in 2006/07."

22 September 2007 Headline The Age read¹⁴⁰

"AGL posts customer losses" with comments as follows:

But analysts seemed most concerned about the fall in customer numbers, even as the group implements its Project Phoenix, its retail process and systems restructuring and rationalization program.

"Our primary focus for 2008 is that we stem the loss of customers," managing director Paul Anthony said.

¹³⁷ Standards and Poor Will Mother Nature Dampen the Credit Quality of Australia's Power Players? Standards and Poor Report April 2007

¹³⁸ Sydney Morning Herald 14 July 2007 Business Day

¹³⁹ Ibid 14 July 2007

¹⁴⁰ The Age 22 September 2007 AAP AGL Posts Customer Losses

“Across Victoria, South Australia and NSW, AGL lost 41,309 customers in gas and 79,241 customers in electricity, but added 30,284 dual fuel customers.”

Victoria was AGL's worst performing state, shedding around 34,000 gas customers and almost 60,000 electricity customers, as well as 35,000 dual fuel customers.

Mr. Anthony admitted the Victorian market had been disappointing.

"It's not by design or intention that we're losing customers in the Victorian market. We're the incumbent. We're going to face the most severe attacks there," he said. "There are many things we're doing, but we're competing in every market.

Australia's biggest gas and electricity retailer, AGL Energy Ltd, has posted full-year earnings in line with its forecasts, but has experienced sharp customer losses, led by Victoria.

AGL's results were complicated by its acquisition of Queensland businesses Sun Gas and Powerdirect earlier in the year, and its merger and subsequent demerger from Alinta Ltd in October 2006.

"This is a very pleasing result given the tumultuous times experienced in the energy markets, where we have seen the most volatile pricing periods in the history of the National Electricity Market," chairman Mark Johnson said.

Earlier this year AGL Energy bought Sun Gas and Powerdirect in Queensland earlier this year, and underwent a \$6.8 billion merger and subsequent demerger from Alinta Ltd in October 2006.¹⁴¹

Under that deal, Alinta acquired AGL's infrastructure business, Agility, for \$6.45 billion, and AGL took an initial 33 per cent of Alinta's Western Australian retail and co-generation business.”

22 October 2007 The Age¹⁴²

Less than two months later, there was a sudden CEO changeover with Michael Fraser replacing Paul Anthony at AGL. This week talks of takeover of AGL Energy are being mooted.

AGL, now part of the Alinta portfolio, in turn taken over by the Babcock and Brown/Singapore Power consortium, would like to achieve the maximum degree of market share.

AGL was aiming for 40% and until early this year felt confident that this can be achieved. Yet there has been a management change – suddenly two weeks ago, when the AGL CEO Paul Anthony was sacked because his predictions of profit margins were not as hoped for. He has been replaced by CEO Michael Fraser.

That Age article reported that AGL had slashed its 2008 earnings outlook, less than three months after issuing the guidance, sending its shares tumbling and prompting heavy criticism from market analysts.

¹⁴¹ The Age 11 September 2007 AGL Interest in Qld, NSW energy assets

¹⁴² The Age, 22 October 2005 AGL appoints Michael Fraser as new CEO

Reported by APP:

“..... AGL cut its outlook for fiscal 2008 earnings by as much as \$50 million to between \$330 million and \$360 million, from an earlier forecast of \$380 million to \$400 million. The company blamed a strengthening Australian dollar and reduced retail energy margins for the downgrade. AGL said it would undertake a review of its business assumptions and operations, including a review of earnings outlook for future years. Last Monday, AGL shares lost \$2.60, or 16 per cent, to \$13.16.

There is talk of a “possible takeover of AGL Energy.

2 November 2007 The Age¹⁴³

A Merrill Lynch report said potential suitors could pay between \$14 and \$16.50 a share for AGL. The report included AGL's main rival, Origin Energy, and International Power as potential bidders. CommSec senior analyst Paul Johnston said that, while AGL might be a takeover target, he did not expect any movement until after the report on the reasons for the profit downgrade was made public at next week's annual meeting.

Paul Anthony had played a significant role in advancing AFL’s strategic objectives including resolving the asset swap with Alinta Ltd. His golden handshake of 5.5 million may have eased the pain of departure, but eighteen months was all that he survived. His predictions about profit margin were not realised. Managing the risk in the current climate is not easy, even for the well-established companies with major market share.

Other Mergers and Acquisitions

*Standards and Poor*¹⁴⁴ had reported in April that the APA Group had been active in recent months purchasing other regulated assets, such as Allgas (purchased from Energex, Queensland gas distribution network) and GasNet Australia (Operations) Pty Ltd. (BBB/WatchNeg/--) and the 17% shareholding in Envestra Ltd. (BBB-/Stable/A-3) sold by Origin Energy.

Now that APA has purchased Origin Energy’s shareholding in Envestra; has acquired other assets and taken over from Origin Energy Assets Management (OEAM, comprising Origin Energy, Truenergy and AGL as the sub-contracted operating management arm of Envestra everybody has cosily settled into an unprecedented comaradie whilst waiting for the next identity change.

About 35% of APA Group units controlled by Alinta are proposed to be delivered into the hands of the shareholders as part of the Babcock & Brown and Singapore Power scheme. Another off-shore acquisition by a consortium bent on adding to its infrastructure assets.

It is a lucrative market as an essential service and the players know how to work it.

Evenstra’s assets are worth approximately \$900 million. Though only listed on the Australian Stock Exchange since August 1997, it has origins dating back over 130 years to the days of the former Gas and Fuel Corporation of Victoria and the former South Australian and Brisbane Gas Companies. These two companies had been owned by Boral Limited.

Envestra was listed on the Australian Stock Exchange in August 1997, but its origins date back more than 130 years to the gas distribution networks of the former South Australian and Brisbane Gas Companies, and the Gas and Fuel Corporation of Victoria.

¹⁴³ The Age Business Day 2 November 2007 AGL shares on rebound (Matthew Murphy reporter)

¹⁴⁴ Will Mother Nature Dampen The Credit Quality of Australia’s Power Players? Standards and Poor 2007 (April)

The South Australian and Brisbane Gas Companies, which started operating in 1861 and 1864 respectively, were owned by Boral Limited. In early 1997, Boral decided to sell the distribution networks of these companies by floating Envestra as a new company, which acquired these assets for \$900 million.

In March 1999, Envestra acquired part of this former Gas and Fuel Corporation distribution network in Victoria for \$1.2 billion bringing the total value of the Company's assets to \$2.1 billion. Today the Company has assets of about \$2.5 billion.

Standard's and Poor's (2007) Recent Research Report¹⁴⁵ reveals a good deal about the merger and acquisition movement within the market up to the time of publishing in April, though there have been further changes since then with AGL, (and Agility AGL's asset management business); Multinet, and then Alinta taking over one from another, till investment firm **Babcock and Brown** and its consortium partner **Singapore Power International** acquired Alinta after trumping a rival proposal by Macquarie Bank Ltd.

CKI is a major shareholder of **Envestra**, owning 16.3% of Envestra's stapled securities. Envestra declines to comment on CKI's plans other than to say that they have conveyed to them their general satisfaction with their investment and the operation of the company. CKI is a Hong Kong based with multiple investments in Australia's energy infrastructure providers, including Citypower, Envestra, ETSA Utilities; Powercorp, Spark Infrastructure; Lane Cove Tunnel and Aqua Tower).

Envestra foresees:

“further considerable rationalisation occurring within the energy industry over coming years as the recent unbundling of businesses reverses with industry participants seeking synergies from different but compatible energy market activities, and as major players seek economies of scale, both in operations, and in financial markets. However, we expect re-bundling of services to occur across energy sectors, rather than the product orientated (i. e. electricity versus gas) integration of industry segments that occurred in the past. This type of trend is evident in the US and some parts of Europe.”

A look at ownership history and operational parameters – the big three

Origin Energy

Origin Energy is registered with the ASX as an Australian gas and electricity company headquartered in Sydney.

The company was previously known as Boral Ltd (see above under Envestra) prior to a demerger in February 2000. The materials and constructions interests became known as Boral Ltd whilst the energy component became Origin Energy The building materials company subsequently became a new company called Boral Ltd.

Origin Energy is a major investor in Envestra. The other major investor is Cheung Kong Infrastructure Holdings (CKI). If either of these investors holds more than 15% of Envestra's shares, they may appoint up to two non-executive Directors, otherwise if between 10-15% they may appoint one Director.

Origin Energy's Asset Management arm (OEAM, comprising TRUenergy, AGL and Origin) was sold to APA in April 2007. The latter took over asset management for Envestra on a sub-contractual basis. APA is a major shareholder in Envestra.

¹⁴⁵ Will Mother Nature Dampen The Credit Quality of Australia's Power Players? Standards and Poor 2007 (April)

The planned merger between Origin Energy did not go through since the former rejected the nil premium offer from AGL.

AGL

¹⁴⁶ *AGL had 1.6 million electricity customers – more than 25 per cent of South Eastern Australia’s residential and small commercial energy users.*

Its downstream customer base includes approximately 2.1¹⁴⁷ million gas customers

On 22 September 2007 The Age reported AGL customer losses. with Victoria as AGL's worst performing state, shedding around 34,000 gas customers and almost 60,000 electricity customers, as well as 35,000 dual fuel customers.

Across Victoria, South Australia and NSW, AGL lost 41,309 customers in gas and 79,241 customers in electricity, but added 30,284 dual fuel customers.

AGL’s wholesale gas portfolio includes more than 4000 petajoules of equity and contracted gas reserves, with long-term contracts sourced from the Cooper, Surat and Gippsland basins. Other investments include a 50 per cent stake in Mioranbah Gas ¹⁴⁸Project, one of Australia’s largest coal-stream methane projects. Moranbah’s output represents about 12 per cent of the Queensland gas market. (it has) A 27.5 per cent stake in the Queensland Gas Company.

Note Gas usage 1 million gigajoules (GJ) = 1 petajoule (PJ). An all-gas household with gas used for cooking, heating and hot water, will use about 30 GJ of gas a year.

AGL’s goal is summarized in their own words as follows¹⁴⁹

“.....to expand (our) “business to its maximum position in retail, so that means about 5 million customer accounts in a landscape that has 12 million, so (we’re) round about 40 per cent”

AGL currently has 1 million customers in NSW.

Organic growth is on the agenda of possibilities for AGL.¹⁵⁰

If NSW decided to sell its electricity distribution system, AGL would be more than casually interested.

The Sydney Morning Herald announced on 14 July 2007¹⁵¹ that AGL had secured a new pipeline deal with Epic Energy. This will allow the construction of a \$140 million gas pipeline to complete the final link between the eastern gas markets.

AGL Energy former CEO Paul Anthony, who was replaced by Michael Fraser in mid-October 2007,¹⁵² has confirmed that:

“The agreement would introduce new competitive sources of gas into the NSW the NSW, Southern Australia and Mt Isa gas markets, helping the gas-fired power generation growth and also securing supply into all eastern states by reducing its exposure to supply interruptions.”

¹⁴⁶ Wikipedia, see contradictory figures provided in April 2007 ABC interview by AGL CEO footnote 24

¹⁴⁷ Note these figures from Wikipedia may have changed. ALG claimed in an April 2007 ABC Interview cited below that there current customer base totalled 4.1 million, so approaching their goal of 5 million. The conflict is likely to be simply over the difference between purchased gas and equity figures. Current equity appears to be 1,000 PJs with the remainder being purchased. This would reconcile the figures provided above from two sources.

¹⁴⁸ AGL website

¹⁴⁹ ABC Interview Inside Business Interview between Alan Kohler and Paul Anthony CEO of AGL 22 April 2007.

¹⁵⁰ Ibid ABC Interview 22 April

¹⁵¹ Sydney Morning Herald 14 July 2007 Business Day

¹⁵² Ibid 14 July 2007

Mr. Anthony is quoted as saying

“The pipeline initiative was possible following the recent upstream and downstream investments made by AGL - the acquisition of a 27.6 per cent stake in QGC in conjunction with entering into a 20-year gas contract, after the acquisition of the Torrens Island Power Station in South Australia”

The Torrens Island Power Station had been acquired by AGL Energy (AGLE) from TRUenergy (trading name for CLP) for about \$417 million.

The sale of an asset swap with AGLE owned Hallet Power Station was about \$350 million. ACCC regulatory clearance was obtained in April 2007 and the asset swap was achieved in July 2007.¹⁵³

At the same time there was much other movement with the OEAM Consortium (Origin Energy; Truenergy and AGL), relinquishing their contracted asset management role with Envestra (in whom CKI Holdings Hong Kong and APA have major shares). That asset management role was assumed by APA.

“The Queensland government's sale of two of its three electricity retail businesses hasn't been a catalyst for new entrants into Australia's electricity retail market, but has served to highlight the consolidation occurring in this sector. The acquisition by Origin Energy of Sun Retail and AGL Energy of Powerdirect Australia Pty Ltd. (BBB/Stable/--) serves to further entrench the dominant positions of these two private companies and to a lesser extent CLP Australia Holdings Pty Ltd.'s (A-/Stable/--) TRUenergy.

The Australian retail market is now even more characterized by these three large players, some mid-market government-owned retail businesses (generally in those states yet to undertake privatization), and a number of small niche players that typically promote a "green" solution.

The recent asset swap of the Torrens Island power stations and Hallet power plant between AGL Energy and CLP Australia helps each entity to better manage their retail exposure in the State of South Australia. Origin Energy's investment in Envestra Ltd. (BBB-/Stable/A-3) and its asset-management business was always seen as noncore, and its exit from these businesses further reinforces that.”¹⁵⁴

The Age reported on 22 August that¹⁵⁵

“AGL posted a statutory net profit of \$410.5 million, while an underlying pro-forma profit of \$326 million was in line with a scheme booklet forecast of \$321 million.

The utility is forecasting 2008 underlying profit of \$380 million to \$400 million, within its target, and expects to reach the upper end of the range.”

AGL is an integrated energy company with 169 years of experiences. Includes retail and merchant energy businesses, power generation assets and upstream gas portfolio.

AGL has Australian's largest retail energy and dual fuel customer base, with 3.6 million customer accounts, which includes customers supplies with gas and electricity through AGL's joint venture partnerships, ActewAGL and AlintaAGL.

¹⁵³ Standards and Poor April 2007 Will Mother Nature Dampen The Credit Quality of Australia's Power Players

¹⁵⁴ Ibid Standards and Poor April 2007

¹⁵⁵ The Age Business Day (AAP) AGL Energy Posts Customer Losses

Alinta wholly owns Alinta GasNetworks, the gas distribution asset (merger of Australian Gas Light Company (AGL) and Alinta Ltd). AGL Energy was subsequently separated from the merged company.

On **6 October 2006** Australian Gas Light Company (AGL) shareholders approved the merger of AGL's infrastructure assets with Alinta Limited and the subsequent separation of AGL Energy. AGL ceased trading on 11 October 2006 and began trading as AGL Energy on 12 October 2006.

Alinta's first half results had been bolstered by a six-month contribution from the assets acquired through the **AGL Energy Ltd** transaction last year. **From the 6th November 2006 AGL Energy** became known as Alinta AE Pty Ltd, ABN 82 064 651 083.

Alinta supplies electricity to approximately 285,000 homes and businesses through its 10,285 kilometres of distribution system.

Alinta's electricity distribution system services 950 square kilometres of northwest greater Melbourne.

Alinta wholly owns AGLE (AGL Energy) subsequently known as Alinta AE Ltd). AGL Energy began trading on the ASX on 12 October 2006.

Alinta wholly owns the asset management business AGILITY previously owned by AGL.

On 31 August 2007 scheme arrangements were completed for Alinta Ltd to transfer to Consortium investment firm **Babcock and Brown and Singapore Power**. The four directors stepped down and have been replaced, as have the company secretaries. The transaction was completed on 3 September 2007.

The scheme involved consortium Babcock & Brown, Babcock & Brown Infrastructure, Babcock & Brown Power, Babcock & Brown Wind Partners, the Bidder and Singapore Power International Pte Ltd.¹⁵⁶

ActewAGL – The GreenChoice range has been expanded by introduce GreenChoice20, a block product of 20 KWh per day, available to residential customers. In addition a consumption-based product GreenChoice is now offered to residential customers in the ACT and Capital Region. Customers may choose a 10, 20, 25, 50,100 or 200 per cent GreenPower product. GreenChoice also offers a 100 per cent GreenPower product for events. Further information on ActewAGL GreenChoice www.greenchoice.com.au.

AGL's \$16 million biogas utilisation project at Melbourne Water's Western Treatment Plant in Werribee is the largest biogas power station in the southern hemisphere. The plant produces approximately 50,000 megawatt hours of renewable energy per annum and cuts Australia's greenhouse gas emissions by 90,000 tons a year. That is enough electricity to power over 7000 households for an entire year – the equivalent of a town the size of Victoria's Traralgon, Tasmania's Burner or Broken Hill in NSW.

ActewAGL was set up in October 2000 when the Australian Gas Light Company (AGL), and ACTEW Corporation, an ACT Government owned enterprise, entered into Australia's first utility joint venture. Following October 2006 business dealings between AGL and Alinta, ownership of ActewAGL's retail arm is shared equally between AGL Energy and ACTEW Corporation and ownership of ActewAGL's distribution arm is shared equally between Alinta and ACTEW Corporation.¹⁵⁷

¹⁵⁶ From Alinta website

¹⁵⁷ ACTEAGL Website <http://www.actewagl.com.au/about/company/default.aspx>

This made the cooperative group Australia's first multi-utility to offer electricity, natural gas, water and wastewater services under one roof.

In February 2004 ActewAGL entered into a management agreement with TransACT Capital Communications Pty Ltd. This means that ActewAGL now provides the management of the day-to-day operations of TransACT.

The TransACT network provides access to full telecommunication services. It offers telephony, high speed data and video services from a number of providers to residential, business and government customers in the ACT.

The benefits promoted by ActewAGL is one provider for almost lifestyle needs. We offer electricity and natural gas at competitive prices, dependable internet access, and through our partnership with TransACT Communications competitive local, national and international telephone call rates as well as high-speed broadband, subscription TV and mobile phone services.

The company structure of ActewAGL is as follows:

The company is organized into two partnerships — ActewAGL Distribution and ActewAGL Retail.

The ActewAGL Distribution partners are ACTEW Distribution Limited and Alinta GCA Pty Ltd. Under the distribution arm:

ActewAGL Networks plan, develop, construct, operate and maintain the electricity network in the ACT and the gas networks in the ACT, Queanbeyan and Nowra.

ActewAGL Water division provide water and wastewater services under contract to ACTEW Corporation who have ownership of the ACT's water and wastewater assets.

The ActewAGL Retail partners are ACTEW Retail Limited and AGL ACT Retail Investments Proprietary Limited. Under our retail arm ActewAGL supplies electricity, natural gas, water and wastewater services to customers.

Business initiatives

ActewAGL has major holdings in a number of business initiatives including:

Ecowise Environmental offers a number of services such as:

- data management services
- scientific laboratory services
- flood hydrology
- geographic information systems (GIS)
- sewer and trade waste
- water resources
- instrumentation facility
- environmental monitoring
- mining services
- quality assurance
- consultancy and training.

TransACT Communications Pty Limited is building and managing an advanced broadband communications network across Canberra. TransACT services include:

- permanent high-speed internet connections
- free to air and pay television services
- fixed line telephone services
- video on demand.

ALINTA

Alinta has assessments and operations in generation, distribution, transmission, retail, construction, assets management and investment. Retail operations are restricted to WA.

On 11 September 2007 Service Stream Ltd acquired Alinta's Sub-Metering Assets from Alinta Asset Management (AAM) (note below Alinta is now owned by consortium Babcock and Brown and Singapore Power).

The Service Stream group provides services to infrastructure-based industries, predominantly in the telecommunications and utilities sectors.

Alinta is Australia's largest energy infrastructure company – since 3 September 2007 it has been owned by foreign company consortium Babcock and Brown and Singapore Power in a major takeover, following many previous ownership changes initiated by Alinta.

Alinta wholly owns Alinta Infrastructure Holdings (AIH); and Babcock and Brown and Singapore Power together own Alinta. The transfer became finalized on 3 September 2007.

Alinta wholly owns cogeneration plants located at Alcoa's Pinjarra (WA) alumina refinery.

Alinta wholly owns Alinta GasNetworks, the gas distribution asset (merger of Australian Gas Light Company (AGL) and Alinta Ltd). AGL Energy was subsequently separated from the merged company.

Alinta's first half results had been bolstered by a six-month contribution from the assets acquired through the **AGL Energy Ltd** transaction last year. **From the 6th November 2006 AGL Electricity Ltd** is now known as Alinta AE Pty Ltd, ABN 82 064 651 083.

Alinta wholly owns **AGLE** (AGL Energy) which is now known as Alinta AE Ltd). AGL Energy began trading on the ASX on 12 October 2006.

Alinta wholly owns the asset management business **AGILITY** previously owned by AGL.

On **31 August 2007** scheme arrangements were completed for Alinta Ltd to transfer to Consortium investment firm **Babcock and Brown and Singapore Power**. The four directors stepped down and have been replaced, as have the company secretaries. The transaction was completed on **3 September 2007**.

The scheme involved consortium Babcock & Brown, Babcock & Brown Infrastructure, Babcock & Brown Power, Babcock & Brown Wind Partners, the Bidder and Singapore Power International Pte Ltd.

Alinta Ltd still retains a 20% equity interest in Alinta Infrastructure Holdings. Alinta Ltd was delisted from the Australian Stock Exchange on 3 September 2007.

As reported in the Sydney Morning Herald of 5 July 2007¹⁵⁸:

The Babcock/Singapore Power offer (contained) a complex mixture of cash, scrip in a basket of mainly Babcock-managed listed entities and fixed interest securities.

In May, Alinta valued the default option in the Babcock offer at \$16.06 per security.

That valuation has been validated - just - by a report by an independent expert, Grant Samuel, that was issued with the scheme documents.

The default option contains \$8.925 per security of cash, \$1.60 of fixed interest paper, 0.752 Babcock & Brown Infrastructure securities, 0.669 Babcock & Brown Power securities, 0.26 Babcock & Brown Wind securities and 0.301 APA Group securities. Grant Samuel valued it at between \$15.74 and \$16.07 per Alinta share.

On **11 August 2007**, the Sydney Morning Herald reported that¹⁵⁹

“The energy utility yesterday delivered a net profit of \$96.5 million for the six months to June 30, a 20 per cent increase on the \$80.3 million reported in the corresponding period of 2006.”

The AGL assets helped Alinta deliver a 458 per cent increase in revenue to \$329.6 million from its energy distribution division and a 113 per cent increase in asset management revenue to \$567.9 million.”

Standards and Poor (2007) had reported in April that the proposed transaction, now complete) had already led to

“Creditwatch negative actions on all the rated Alinta group companies and SP AusNet Group (A/WatchNeg/--_ companies following an outlook charge on the parent company Singapore Power.”

In October 2006 the energy utility **Alinta** had previously picked up **AGL's** infrastructure asset and asset management business (Agility) following a \$6.8 billion "**asset swap**" between the two groups.¹⁶⁰ Alinta Energy (AE) was established following Alinta's purchase of a portfolio of power stations in April 2004 from the Duke Energy Corporation.

On 27 February 2007 Alinta IH Pty Ltd had taken over 100% of Alinta Infrastructure Holdings (AIH), with AIH subsequently delisting from ASX.

In October 2006, Alinta took over AGL infrastructure and assets management, with subsequent separation of AGL Energy who began trading on the ASX on 12 October 2006.

At the time of the merger Alinta had a controlling interest in the following:

- United Energy Distribution Pty Ltd (Electricity Distribution)
- Alinta DENO Pty Ltd (Electricity Distribution)
- Multinet Gas (B No 1) Pty Ltd and MultiNet Gas DB No 2) Ltd t/as MutliNet Partnership (Gas Distribution)
- At the time of the merger, AGL Group had controlling interests in:
- AGL Electricity Ltd (Electricity Distribution)
- AGL HP1 and AGL HP 2

¹⁵⁸ Sydney Morning Herald “Alinta sale not quite going by 547-page book 11 July 2007

¹⁵⁹ Sydney Morning Herald “Powerful \$96.5M finish as Alinta waits to be taken over” 22 August 2007

¹⁶⁰ Source The Age AA 2007 Breaking News August 10, 2007 - 3:11PM Alinta delivers \$96.5m first half profit

- AGL HP 3 and AGL Hydro partnership (Electricity generation)
- AGL Power Generation (Vic) Pty Ltd (Electricity Generation)
- LYP Parnter 1 Pty Ltd; LYP Partner 2 Pty Ltd; LYP Partner 3 Pty Ltd; LYP Partner 4 BV; Loy Yang Power Management Pty Ltd and Loy Yang Marketing Management Co Pty Ltd (electricity Generation 35 percent interest held by AGL Group)
- AGL Sales Pty Ltd (Electricity and Gas retailer)

In October 2005, ownership of Bairnsdale Power Station had **transferred** to AIH, with Alinta maintaining a 20 per cent interest in AIH and through a long-term operational services agreement, has responsibility for management, maintenance and construction activities on the power station.

Those assets were transferred to Alinta Infrastructure Holdings (AIH) upon its listing in October, 2005, with Alinta retaining 20% equity interest.

In October 2005 Alinta Energy was established at the time that Alinta's following purchase in April 2004 from Duke Energy Corporation of a portfolio of power stations portfolio of power stations.

Alinta supplies electricity to approximately 285,000 homes and businesses through its 10,285 kilometres of distribution system. Alinta's electricity distribution system services 950 square kilometres of northwest greater Melbourne.

United Energy had been taken over by Multinet and then 20.1% of the latter by Alinta, who is now owned by Babcock and Brown and Singapore Power.

Alinta established an alliance with Alcoa in mid-2002 to develop cogeneration facilities at Alcoa's Alumina Refineries in Western Australia. It has a 100 per cent investment in the cogeneration plants located at Alcoa's Pinjarra alumina refinery.

Transmission operations managed and owned by Alinta include Eastern Gas Pipeline (Victoria), Bunbury Gas Pipeline (WA), Queensland Gas Pipeline, and Tasmanian Gas Pipeline.

DUET and Alinta jointly own United Energy (34% Alinta) and MultinetGas (20.1% Alinta) with a minority interest being held by Alinta and the remainder by DUET – Diversified Utilities Investment Trusts.

Alinta has three distribution arms in Australia, three in Victoria, one in WA and one in NSW.

TRUenergy (parent Company City Lighting and Power)

TRUenergy is the trading name for City Lighting and Power (CLP) a wholly owned Hong Kong company. It has been variously known under the following names:

- CLP Australia Retail Pty Ltd
- SPI Retail Pty Ltd
- TXU Pty Ltd
- Kinetik Energy Pty Ltd
- TUA (No.11) Pty Ltd.

TRUenergy had taken over Eastern Energy, and when it purchased TXU Australia (Texas Utilities, TRUenergy (CLP's trading name) retained the generator and retail arm, whilst the network arm SP Ausnet was taken over by Singapore Power.

See brief profile of parent company above, City Lighting and Power, a wholly owned Hong Kong company listed on the Hong Kong Stock Exchange.

THE PARENT COMPANIES and their affiliations

Three major offshore parent companies or consortiums have secured most of the market now. These are:

Cheung Kong Infrastructure Holdings (CKI or The Group) is the largest publicly listed infrastructure company in Hong Kong with investments in energy, transportation, water, and infrastructure related businesses. It operates in Hong Kong, Mainland China, Australia, UK, Canada and the Philippines. Its market share as at 31 December 2006 was about HK\$55 billion. It is listed on the Hong Kong Stock Exchanges.

In December 2005, CKI sold a 49% stake in the prime power assets of ETSA Utilities, Powercor and CitiPower to Spark Infrastructure Group, an infrastructure fund which was subsequently listed on the Australian Stock Exchange. CKI also owns a 9.9% direct stake in Spark Infrastructure, as well as acts as a Manager of the fund.

CKI's investments in transportation infrastructure projects in Mainland China continue to generate stable profits. In Australia, the Group also has a stake in Sydney's Lane Cove Tunnel.

CKI has also invested in water businesses in Australia and the UK with the acquisitions of AquaTower and Cambridge Water in 2004 respectively. CKI is a major shareholder of Envestra, Australia largest gas distribution company with a cosy relationship with asset management company APA, after the latter had purchased Origin Energy's 17% shareholding in Envestra Ltd. CKI holds a 16.4% stake in Envestra that has been generating double-digit cash yields consistently since 1999.

CKI's assets include:

- Spark Infrastructure Group 9.9% , CKI owns 50% interest in this management company, an infrastructure fund listed in Australia with seed assets being a 49% stake in each of Citipower, ETSA Utilities and Powercor
- Lane Cove Tunnel, Sydney NSW. 3.7 km dual two-three lane tunnel work A\$1.7 billion. 40% share
- Aqua Tower (with exclusive rights until 2027 to provide portable water to four towns in Victoria serving approx 25,000 people
- Other CKI assets are in the UK (Northern Gas Networks) and Cambridge Water
- The remainder are in Hong Kong, including Hong Kong Electric and various power plants in China, and in a quarry in Phillipines.
- Infrastructure related companies are based in either Hong Kong or Guangdong and the Phillipines including, construction, asphalt, cement and a limestone quarry (Phillipines). CKI's investment in Hong Kong Electric Holdings yielded a 7 per cent growth compared with the same period in the previous year, with a profit contribution of HK\$1,021 million.

For the 6-month period of 30 June 2007, CKI's unaudited profit after tax attributable to shareholders amount to HK\$ 2,108 million with a 27% increase over the same period of the previous year.

Since CKI is a major shareholder in Envestra, some background is discussed here.

Envestra Limited is Australia's largest listed natural gas distribution company. with approximately 19,100 kilometres of natural gas distribution pipelines and 1,000 kilometres of transmission pipelines. It serves over 970,000 consumers in South Australia, Victoria, Queensland, New South Wales and the Northern Territory. Envestra generates revenue by charging retailers for the transportation of natural gas through these networks.

Two major shareholders in Envestra are CKI (16.4%) and APA (17%) The latter now acts as contracting operating manager for Envestra. The APA Group had been active in recent months purchasing other regulated assets, such as Allgas (purchased from Energex, Queensland gas distribution network) and GasNet Australia (Operations) Pty Ltd.

The CKI Group's portfolio in Australia and the UK returned a profit contribution of HK\$604 million.

The investment company **Babcock and Brown and consortium partner Singapore Power**, who acquired the Alinta Group on 3 September 2007, and with it the AGL group.

[China Lighting and Power \(CLP\)](#), a wholly owned Hong Kong Company who is the parent company for TRUenergy.

TRUenergy's parent company, City Lighting and Power (CLP) was founded in Honk Kong in 1901. It is now the largest electricity investor-operators in the Asia Pacific region. It generates and distributes electricity, and has expanded from Kong Kong into mainland China, Australia, India, Thailand and Taiwan. This year its market capitalization was approximately HK\$126.3 billion.

The Group is listed on the main board of the Stock Exchange of Hong Kong (stock code 002 and is held by CLP Holdings Ltd.

Other business include CLP Engineering Limited (CLPE) is a wholly-owned subsidiary of the CLP Group, facility management, public lighting, infrastructure electrical management and research.

Energy services include demand-side management, initiatives, power quality solutions, renewable energy applications, energy system retrofitting work, energy saving performance, contracting. In addition they conduct energy audits, prepare proposals for energy, management design, supply, install test and commission equipment and conduct post-system performance measurement and verification.

CLP claims to have

“a social conscience that springs deep from our heart; that they have implemented many environmental and community initiatives, making a meaningful contribution to the lives of Hong Kong's community at large”

That is a good start with attitude. Given these considerations, Australia should have no difficulty negotiating with TRUenergy, a trading name for CLP to give special consideration to the vulnerable and disadvantaged end-consumers using their energy suppliers. Perhaps that applies to the others too.

Market Structure¹⁶¹

Refer to Table 4.2 Nera Consulting Report

Summary of electricity customers by jurisdiction and retailer

Customers by jurisdiction at June 2006 (m)

Licensed Retailer ACT NSW Qld SA Tas Vic Total Total (%)

Source: UBS, Australian utilities structure 2006 - updated for recent acquisitions (numbers may not add due to rounding).

The Market structure at the time of preparation of the Nera Economic Consulting Report, The Wholesale Electricity Market p50 Electricity Retail in the NEM is summarized in a table on p 57 of that Report as Table 4.2

The table illustrates the relative market share of each retailer across each jurisdiction. Nera Economic Consulting reported that

The incumbent retailers remain dominant in all jurisdictions of the NEM

Victoria, New South Wales and South Australia have experienced some market entry, but there do not appear to be significant new entrants in the Australian Capital Territory, Queensland and Tasmania

There are several full-service entrants that have been successful in gaining market share, including Energy Australia in Victoria, TRUenergy in South in South Australia and AGL in New South Wales, These are all incumbent retailers in other jurisdictions

Niche retailers have managed to establish customer bases in Victoria and New South Wales

Across all jurisdictions of the NEM, AGL and Origin are the largest retailers and have the greatest geographic coverage. These are followed in descending order of size by EnergyAustralia; TRUenergy, Integral Energy and Country Energy

PRODUCT AND SERVICES OVERVIEW

Market positioning:

The Wallis Retailer Report describes a range of strategies used by retailers to differentiate themselves from others as reflected in a range of business models.

It frankly recognizes the acknowledgement by retailers that energy is a low-involvement commodity, or rather service. For that reason a number of strategies have been adopted in their positioning strategies:

1. Flexible billing (such as bill smoothing, monthly billing and discounts for early or on-time payments)
2. **For those on fixed incomes these flexible options are attractive terms**
3. **Australian owned and**
4. **Segment specific such as the targeting only of domestic or only business customers, or certain components of these**
5. **Dual fuel and extended service providers**

¹⁶¹ Taken from Nera Economic Consulting Report, The Wholesale Electricity Market p50 Electricity retail in the NEM source UBS Australian utilities structure 2006 – updated for recent acquisitions (numbers may not add due to rounding) found at AEMC Retail Competition website <http://www.aemc.gov.au/pdfs/reviews> Review of the effectiveness of competition in the gas and electricity retail markets conreps

Wallis found that five of the six retailers licenced to sell gas and electricity actively offer both to customers because of benefits of offering both. About 1,500,000 homes (75%) and 43,000 (16%) in scope businesses have mains gas connected in Victoria.

The survey found that one first tier retailer felt this arrangement provided better prospect for heavier discounting with retention arrangements in place.

Green energy/renewable energy/energy efficiency

Comment:

Some specialize exclusively in green energy, such as Jackgreen.

The Wallis Retailer Survey reports feedback from one of the first tier retailers that though Greenenergy has been a big psychological factor for customers, some customers are not prepared to pay for it

Though that position may see some slow changes, the bottom line is that many will just not be able to afford additional costs for energy to support the change to greenenergy.

A PlanetArk survey compared the cost of all the GreenPower products on the market based on the average annual energy consumption in NSW. The average customer spends about \$1000 a year on energy. Switching to 100 per cent renewable energy would cost an average customer between \$4 and \$8 a week more. Over a year that would be between \$2229 and \$433 extra.¹⁶²

Greenswitch a non-for-profit explains the difference between Greenenergy and Greenswitch as follows:

“The national energy grid (can be seen as) as a large lake. This lake is surrounded by houses and also by sources of water (rivers streams etc.). When your house draws water from the lake (grid) it lowers the water level and the water pressure (voltage) available to the houses. We can refill the lake from any of the sources but some have less long term environmental effects than others. These renewable sources are similar to the Green Power generators but they cost more to access and require a greater payment than the other less environmentally friendly alternatives. By paying the extra money through a Green Power provider such as GreenSwitch the lake is replenished through the renewable source therefore removing the requirement to refill from the non renewable source.”

Market Pricing


Greenpower can cost more. Only two retailers offer greenenergy free up to 10% but additional costs climb after that. Those two are Jackgreen and Integral Energy (NSW) (the latter not listed on the Wallis Report, presumably because it is in NSW and secondly because this company is not yet retailing in Victoria though with a licence to do so)

The table below shows comparative costs and additional costs applied for percentages of green energy¹⁶³

¹⁶² Sunday Telegraph

¹⁶³ Sunday Telegraph News.com/sundaytelegraph

COST OF GOING GREEN			
10% Greenpower		100% Greenpower	
<i>Energy Supplier</i>	<i>Extra cost per week</i>	<i>Energy Supplier</i>	<i>Extra cost per week</i>
Jackgreen Energy	\$0.00	Jackgreen Energy	\$4.40
Integral Energy	\$0.00	Country Energy	\$4.40
Greenswitch	\$0.46	Greenswitch	\$4.62
EnergyAustralia	\$1.00	Integral Energy	\$6.35
TRUenergy	\$1.00	EnergyAustralia	\$6.72
Origin Energy	\$1.00	Climate Friendly	\$7.00
Country Energy	\$1.50	AGL	\$7.91
Climate Friendly	\$3.05	Origin Energy	\$7.91
		Origin Energy	\$8.00
		TRUenergy	\$8.33




BRIEF LOOK AT SELECTED SMALLER RETAILERS

It is rather surprising that the Wallis Report was commissioned only on the basis of a retailer survey with recorded retailer perceptions and outside of the context of the market as a whole and investor reports.

Some investors have been quite reserved about second-tier retailers and how they may fare.

As observed in the Wallis Report:

“Some retailers have entered the market place since January 2002 (for electricity and October 2002) for gas. These new retailers are referred to as second tier retailers in this Report. They therefore started with no customers and have built their Victorian customer bases in line with their own business plans.”

Further, the Report Second tier retailers have adopted a range of business models including dual fuel providers, green and renewable products providers, internet providers, customers service focused and flexible billing options in order to differentiate themselves and establish a position in the market.

John Smith, Chairman of Jackgreen, a greenenergy specialist retailer currently selling electricity only though with licences in NSW and South Australia to sell gas, observes that¹⁶⁴

“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.”

¹⁶⁴ Jackgreen Annual Report 2005/2006 – Chairman’s Report

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.

AGL is aiming for 40% of the total market share, despite its rocky road during the past six months.

It would be terrible if the smaller companies taking the gamble in competition with retailers proportionately giant status did not survive the acquisition trends already evidenced during the past 12-18 months, even amongst the larger retailers.

The public would naturally want to see the smaller second-tier retailers succeed.

A brief summary of the operations of the second-tier retailers is shown below obtained directly from their own websites and some investor reports.

It is of some concern that opinion surveys and customer feedback on switching behaviour based only on quantitative data has been relied upon instead of a more thorough look at all components of the market distribution chain; investor forecasts and analysis of annual reports

This applies as much to the larger established first-tier retailers as to the new entrants.

The Wallis Retailer Survey reported the distribution and number of second-tier retailers as follows:

Electricity and Gas Second-Tier

- Australian Power and Gas (APG)
- Simply Energy (previously under the EA-IPR Retail Partnership trading as Energy Australia)
- Energy Australia (now trading as trading as “Simply Energy)
- Victoria Electricity

Electricity Only

- Click Energy;
- Country Energy;
- Jackgreen Energy (Jackgreen);
- Momentum Energy;
- Neighbourhood Energy;
- Powerdirect (backed by AGL); and
- Red Energy.

[The CRA International Report 8 November 2007 for AEMC Retail Review](#)

As observed on p 8 of the CRA Report dated 8 November,

“Against the background of the reserve power, the Government negotiated a retail price path with the local electricity and gas retailers, which applies for a four-year period from 1 January 2004 to 31 December 2007. It notes in the footnote (3) that prior to the price path being put in place, the ESC had undertaken a one-year review of electricity prices (with some input from CRA) which set prices for 2002, and the Victorian Government had undertaken a one-year review (advised by CRA) which set electricity and gas prices for 2003.

The CRA November 2007 report further explains that

The rationale for the four-year price path was that it would provide some certainty in the market for investors, local retailers, new entrant retailers, and customers. The price path was to sit alongside a competitive market. Unlike the price-setting of monopoly service providers, the aim was not to provide customers with service at least cost, rather it was intended as a 'safety net: on a transitional basis to protect customers that did not move to a market contract, whilst also encouraging developments in the competitive market.'

The CRA Report under 2.3 reported the composition of the market since the industry had been restructured:

Though there has been new entry, as reported by CRA, the market has been volatile and many of the second-tier retailers have already fallen on hard times. See for example Momentum Energy's distressed sale in July to Energy Australian, whose "control and ownership was taken over by EA-IPR partnership by International Poser. The transition was completed in August 2007."

See APG's position as incumbent retailer when it responded to the RoLR event in June 2007 taking over by one report 11,000 customers, and in another 5,000. It is difficult to explain the discrepancy here.

Note that the CRA report records discrepant figures also between the AEMC First Draft Report figures and its own commissioned survey of consumers undertaken by Wallis Consulting as a quantitative survey only of 1000 Victorian customers without specialized sub-segmentation beyond the usual demographics; without in-depth follow up longitudinally; without ascertaining underlying reasons for market failure or lack of participation – simply attributed to low-involvement indifference without examination of triggers for this perceived "apathy."

Discrepancies in figures were identified by CRA as follows (p10 Final Report 8 November 2007):

- *60% of residential and 43% of small business customers had switched to an electricity market contract (averaging 60% overall); and*
- *60% of residential and 31% of small business customers had switched to a gas market contract averaging 59% overall. These figures were sourced from the review of the Effectiveness of Competition in Electricity and Gas Retail Markets in Victoria, First Draft Report AEMC 4 October 2007*

CRA also reported that: (p 10 of Final CRA Internal Report to AEMC Review)

The Commission noted that its own recent customer survey had indicated different levels of switching to a market contract:

- *60% of residential and 54% of small business customers in the case of electricity and*
- *42% of residential and 38% of small business customers in the case of gas.*

Under 2.3 p 8 of the CRA Report, the three first tier local retailers were identified – AGL, Origin Energy and TRUenergy – all offering both market contracts and standing offer contracts in both electricity and gas supply across Victoria;

CRA listed the new entrants as:

Australian Power and Gas, Country Energy Simply Energy (previously the EA-IPR Retail Partnership trading as Energy Australia; and Victoria Electricity).

As at August 2007 the following new entrant retailers offered only electricity market contracts

Click Energy, Jackgreen, Momentum Energy. Our Neighbourhood Energy (Powerdirect (now party of AGL) and red Energy).

Note that Momentum is no longer serving Victorian residential customers who were sold to APG in a distressed sale in late July 2007. (p9 CRA Report).

CRA acknowledges:

- *“That figures for retail customers shown in table 3 for “other” retailers” have been combined from different sources and represent an estimate (Victorian electricity retailers’ market shares as at 30 June 2006).”*
- *“No retailers offer gas only market contracts. Several retailers have retail electricity and/or gas licences are not currently active in the Victorian energy market, or only serve larger usage industrial customers.”*

AUSTRALIAN POWER AND GAS¹⁶⁵

This is an Australian Company was listed on the Australian Stock Exchange (ASX) on 15 December 1999 with a New South Wales registered address. Their ASX code is APK.

Australian Power & Gas is a new entrant to Australia’s retail energy market and has entered into an exclusive agreement with a major energy market participant that

“....secures APG full electricity purchase requirements in Victoria for the next three years.”

That transaction effectively fixes the purchase price for the electricity at a profitable rate and covers the full volume used by the company’s Victorian customers. The deal was effective from 1 June 2007. This company is **not dealing directly with the wholesale** but is focusing on adding to its customer base profitably as part of a risk minimization strategy.

In conjunction with this agreement, Australian Power & Gas has now secured its Australian Financial Services License (AFSL). This license allows Australian Power & Gas to enter into wholesale energy purchase agreements. The license was issued by ASIC following a rigorous application and evaluation process.

The company has signed and completed all documentation establishing an A\$100 million working capital facility and an A\$10 million convertible note with Fortress Investment Group LLC, a New York-based company with US\$30 billion under management.

In addition, Australian Power & Gas has secured a A\$10 million standby equity facility agreed in May with Cornell Capital Partners LP, a U.S. based investment fund and in accordance with its capital plan has drawn down a US\$3.5 million convertible note also agreed with Cornell.

This company is offering a range of retail energy plans to residential customers only in Victoria; electricity and greenricity in some parts of NSW with gas shortly available; and gas and electricity, including GreenPower accredited greelectricity in southeast Queensland.

¹⁶⁵ Information obtained on APG website

The licences to sell gas and electricity was granted by The Essential Services Commission Victoria; the Independent Pricing and Regulatory Tribunal NSW; and the Queensland's Department of Mines and Energy respectively. Approval from NEMMCo approval was also obtained.

By 10 May the company had signed up 10,000 customers in three states through 14 May 2007. The acquisition of a further \$15,000 Victorian customers through a distressed sale (the EnergyOne RoLR event) boosted the customer base, which now stands at 45,000, with 25,000 being in Victoria after the windfall customer acquisition referred to.

It has developed a “flexible business model” with outsourcing of key business functions.

VICTORIA ELECTRICITY (second-tier retailer)¹⁶⁶

This new entrant describes its services online as a Victorian state government licenced electricity and gas retailer.

Product offers:

- One easy read monthly bill covering both electricity and gas usage
- Same pipelines used so no risk to supply
- Local distributor who owns and maintains existing pipes lines and meters and responsible for attending to any emergencies, gas outages or electricity faults 24 hours a day 7 days a week
- Existing benefits maintained
- Prizes
- Green energy options also advertized on the website.
- Meters read every two months for gas and every three months for electricity

SIMPLY ENERGY (previously known as Energy Australia) (International Power Australia (IPRA) retail operation)

Ownership:¹⁶⁷

Simply Energy is the new trading name for International Power Australia (IPRA)'s retail operation. It was previously known as Energy Australia.

Energy Australia, is now known as Simply Energy¹⁶⁸. International Power retails electricity in both Victoria and South Australia under the Energy Australia brand as part of the EA IPR Retail Partnership.¹⁶⁹. Note Energy Australia is now known as Simply Energy.

Simply Energy was previously Energy Australia in Victoria and South Australia. Prior to August 2007 the business was a 50/50 partnership between Energy Australia and International power (Australia) and was trading as Energy Australia.

¹⁶⁶ Victoria Energy website <http://www.victoriaelectricity.com.au/?Join/Careers/At/VE>

¹⁶⁷ From website Simply Energy http://www.simplyenergy.com.au/about-us/About-Simple_energy.aspx

¹⁶⁸ CRA International Report 8 November 2007 to AEMC Retail Competition Review – referenced to EnergyAustralia, <http://www.energy.com.au/energy/ea.nsf/Content/SA+Who+is+EnergyAustralia>. But site inaccessible . See instead <http://www.simplyenergy.com.au/>

¹⁶⁹ Nera Economic Consulting Report commissioned by AEMC Retail Competition Review August 2007 p71, para 5.2

Simply Energy was purchased by International power Australia (IPRA) retail operation in South Australia and Victoria.

Simply Energy is one of Australia's largest energy suppliers, with over 400,000 electricity and gas accounts. **Simply Energy** sells electricity and gas to retail customers in Victoria and South Australia. **Simply Energy** was previously

EnergyAustralia in Victoria and South Australia. Prior to August 2007 our business was a 50/50 partnership between EnergyAustralia and International Power (Australia) and was trading as EnergyAustralia. Since the retail partnership was formed in July 2005, the number of power and gas accounts has increased from 175,000 to more than 400,000. **Simply Energy** is now owned by International Power Australia who entered the Australian energy industry in 1996 and have grown to become the country's largest private generator of electricity. Simply Energy is International Power Australia's (IPRA) retail operation in South Australia and Victoria.

As one of Australia's leading independent power generators and energy retailers, International Power Australia has nearly 1,000 employees across Australia. The company has power stations in Victoria, South Australia, Western Australia and Simply Energy is a powerful retail presence in the Victorian and South Australian markets.

Simply Energy's new website describes its operations as follows¹⁷⁰:

Simply Energy is one of Australia's largest energy suppliers, with over 400,000 electricity and gas accounts. Simply Energy sells electricity and gas to retail customers in Victoria and South Australia. Simply Energy was previously EnergyAustralia in Victoria and South Australia. Prior to August 2007 our business was a 50/50 partnership between EnergyAustralia and International Power (Australia) and was trading as EnergyAustralia. Since the retail partnership was formed in July 2005, the number of power and gas accounts has increased from 175,000 to more than 400,000. Simply Energy is now owned by International Power Australia who entered the Australian energy industry in 1996 and has grown to become the country's largest private generator of electricity. Simply Energy is International Power Australia's (IPRA) retail operation in South Australia and Victoria.

As one of Australia's leading independent power generators and energy retailers, International Power Australia has nearly 1,000 employees across Australia. The company has power stations in Victoria, South Australia, Western Australia and Simply Energy."

Products and Offers

Offers broad-based solutions with 100 years experience. Claims to be leader in providing broad-based energy solutions ranging from electricity and gas supply to energy management and renewable energy alternatives. They operate an electricity network of around 22,275 square kilometres – distributing electricity to the Sydney, Central Coast and Hunter regions. We also sell electricity to customers in NSW, ACT, SA, Victoria, and Queensland. electricity to over 1.5 million homes and businesses.

Their operations also include purchasing and supplying energy, electrical contracting, customer connections, emergency restoration and local repairs and major capital works.

¹⁷⁰ Simply Energy Website (previously known as Energy Australia a brand name for International Power Australia IPRA)
http://www.simplyenergy.com.au/about-us/About-Simple_energy.aspx

Customers include those living in both rural and urban residential areas throughout the country and small to large businesses and industries such as mining, shipping, tourism, manufacturing and agriculture.

They state that their priority has always been to provide the highest level of customer service. That means finding new ways to help our customers save money, responding promptly to emergency calls, and always delivering quality and value.

Energy Australia (now Simply Energy, the trading name for International Power Australia in Victoria and South Australia) is believed to have acquired Energy One's customers following an RoLR event earlier this year in June..

On 23 June 2007 it was announced that Energy One's trading had been suspended. High wholesale energy prices were reported in The Age as "claiming their first victim, with junior retailer Energy one prevented from operating and its customers transferred to other retailers.

The Age had reported on 23 June 2007 that:

"High wholesale energy prices appear to have claimed their first victim, with junior retailer Energy One prevented from operating and its customers transferred to other retailers. Energy One, which was formed in 1996 and listed on the stock exchange in January, has also entered into a trading halt on the Australian Securities Exchange. Its shares are valued at 58¢ after reaching a high of \$1.26 in January."

The National Electricity Market Management Company (NEMMCO) issued Energy One with a suspension notice yesterday afternoon, meaning that from midnight it cannot trade or enter into any transaction on the electricity market until the suspension is lifted.

At that time, Energy One's customers, of which there are more than 5000¹⁷¹ spread across Queensland, NSW, the ACT and Victoria, were to be transferred to alternative retailers.

Energy One, which was formed in 1996 and listed on the stock exchange in January, has also entered into a trading halt on the Australian Securities Exchange. Its shares are valued at 58¢ after reaching a high of \$1.26 in January.

"Following an announcement by the company, normal trading will resume on Monday the 25th of June 2007," Energy One said in a statement to the market.

The problems facing upstart retailers have been underlined in recent days as energy demand hit a high in NSW where spot prices, which are set half hourly, were close to \$10,000 per megawatt hour, and winter records were set in Victoria and South Australia.

Steve Edwell, chairman of the Australian Energy Regulator, said retailers were being squeezed in the middle, forced to absorb high prices but unable to pass them on to consumers.

"If there is a lesson out of this at an early stage, it is that energy markets can be volatile and traders need to have a strong risk mitigation strategy and future hedging in place," he said. "I expect the reasons and the impacts of the market on this retailer will be assessed closely by us and others. We need to make sure the lights don't go out for the Energy One customers."

Energy One's customers are largely in the small business area and predominantly in NSW. It had only two customers in Victoria, one in the ACT and about 160 in Queensland.

¹⁷¹ It seems that there are discrepant figures for this total. The Age reported 5000 customers in four states, whilst other figures, perhaps those of the ESC now seemingly inaccessible claimed 11,000 customers who were transferred through this RoLR

Under the retailer of last-resort scheme, each energy retailer is required to list another retailer to supply its customers with electricity if it enters a suspension. It is believed Energy Australia could take Energy One's customers.

Gavin Dufty, manager of social policy and research with St Vincent de Paul, said the situation was unprecedented and regulators had to make sure that Energy One's customers were protected.

"There are so many questions that arise: Will these customers have the same terms and conditions as before? What will their contract be like? These are questions that I think are only being worked through now," he said. "Will Energy One be the first of many, will all these second-tier retailers start falling?"

The Essential Services Commission had reported:

"On 24 July 2007 Australian Power and Gas purchased from Momentum Energy their 15,000 unhedged Victorian customers – a market that Momentum could no longer afford because of wholesale prices."

APG explains this as a distressed sale narrowly missing a Retailer of Last Resort Event (RoLR). The acquisition was secured at well below recent energy industry acquisition price.

APG has published the purchase price is \$1,000,000 with \$750,000 payable now and the balance due on 30 December 2007 subject to variations for any customer losses. This represents an acquisition cost under \$67 per customer account.

The new acquisition brings APG's total customer account base to approximately 45,000 since commencement of sales in February 2007

If a RoLR had occurred with Momentum it would have been the second such event in Victoria in a matter of months

CEO of Australian Power & Gas Pty Ltd Mr. James Myatt said,

"This transaction is the result of an urgent sale and the price paid is at a significant discount to the normal market. We see this as excellent value, and well under the \$1000 plus paid for customers in recent industry transactions. It is also less than what we would normally expect to pay through our sales acquisition channels."

CLICK ENERGY PTY LTD MELBORNE

Granted licence 21 March 2006 with outsourcing arrangements pending and commencement deferred till those arrangements were in place.

The website is brand new and under construction so the information below and the "legal stuff" is all there is view at present, plus licence terms on ESC website

Click energy product offers include¹⁷²

- 5% of bill
- 4 bills a year
- Tree friendly email bills
- Online bills
- No contract or exit fees

¹⁷² <http://www.clickenergy.com.au/Display.aspx?tabid=2217>

Comment:

These are attractive terms, especially the no contract or exist fees for many who may wish to switch.

Note for some reason Click Energy is not included in the Summary of electricity customers by jurisdiction and retailer provided in the NERA Economic Consulting Wholesale Electricity report to the AEMC's Retail Competition Review, p590 Table 4.2

COUNTRY ENERGY¹⁷³

This is a leading Australian energy services corporation owned by the New South Wales Government, with around 4,000 employees serving more than 870,000 customers.

Country Energy manages Australia's largest power supply network across 95 per cent of New South Wales' land mass and offers retail electricity in five states and territories.

The product range includes bottled gas, internet services and energy and water management solutions. We also provide reticulated natural gas to 24,200 customers in southern New South Wales and water and sewerage services to 10,000 customers in far west New South Wales.

JACKGREEN¹⁷⁴ (specializes in greenenergy) (JGL.ASX)

The information below was readily available and this greenenergy company with quiet optimism has not been singled for any particular reason other than to illustrate that there is more to gathering market information than conducting opinion surveys and quantitative switching behaviour data.

Jackgreen describes its philosophy as

"...one that led (us) to establish a renewable energy business focused on offering simple and cost effective ways for the average Australian household to make a difference to the environment. It claims to be the only licenced electricity retailer in Australia dedicated to reducing carbon emissions through renewable energy, with every product accredited by GreenPower.

Jackgreen is listed on the Australian Stock Exchange and is licensed by the New South Wales, Victorian, Queensland and South Australian Governments to retail electricity. It also holds gas licences in NSW and South Australia. Its market positioning is based on consumer choice, price competition and growth of investment into sustainable industry. Its target market is a 50% unsatisfied customer demand for largely residential and small to medium enterprises (SMEs).

Incentive officers include

- A guaranteed percentage of green electricity for every customer, and;
- Pricing at no extra cost than you now pay for "standard" electricity*;
- A customer billing system that is 'state of the art';
- The opportunity to develop genuine community partnerships through **Jackgreen** providing a donation on behalf of customers to a **Jackgreen** approved charity or community organization

It is important to note that only up to 10% greenenergy through this retailer is free with progressive cost up to 1000% at \$4.40 per week extra.

¹⁷³ From country energy website

¹⁷⁴ <http://www.Jackgreen.com.au/about-Jackgreen/>

Jackgreen can supply 10% Greenenergy at no cost but 1000% greenenergy through Jackgreen would cost an extra \$4.40 per week.

Jackgreen's Annual Report 2005/2006 includes the following information

- *Commenced supply of electricity to retail customers in Victoria in September 2005.*
- *Passed the 25,000 customer sign ups target ahead of forecast in March 2006.*
- *The Company halted its sales growth to strengthen its platforms for further growth moving forward.*
- *The Company entered a Deed of Undertaking with IPART (The NSW Regulator) following from customer complaints predominantly caused by an outsourced telemarketing campaign.*
- *Received licences to retail Gas in New South Wales, and approval for the issue of licences for Electricity and Gas in South Australia. The company expects to commence retail activity in South Australia in the next six months.*
- *Established our own in house call centre and operations office in Parramatta.*
- *The company sold the remaining property developments assets and repaid the related outstanding debt. The company has commenced the process to wind up and deregister the property subsidiaries.*

Jackgreen's non-executive Chairman John Smith is the former CEO of Australian Energy Limited (ASX Code: AEN) and a former group executive of Powercor Limited, Pacificorp Inc, Telstra Corporation Limited, Ritronics Limited and Seiko Epson Pty Limited.

Chairman John Smith predicts as follows:

"As we continued to grow the business we have called on shareholders for new investment capital and are pleased with the continuing response we have received. Babcock & Brown continue to follow the company's growth with support and are themselves developing a strong supply capacity with the recent purchase of electricity generation in SA and via the Wind Partnerships fund. Our cycle of new share issues appears to be nearing completion and excluding an acquisition of another second tier retailer or an acceleration of customer acquisitions, our free cash flow should maintain and develop cash reserves for the business in FY 06/07.

Jackgreen's financial goals¹⁷⁵ and outlook are modestly reported as follows:

- *reach a cash flow breakeven as soon as possible;*
- *maintain strong margins by establishing a low cost to serve and acquire operation; and*
- *deliver superior returns to shareholders over time.*

The company is on a course to reach cash-flow breakeven in the near future. We reported that the month of June 2006 was the company's first cash-flow positive operating month for the electricity business. While this did not continue in the following two months, we anticipate that we are close to reaching cash breakeven in the months ahead.

Our growth has taken significant shape in the NSW electricity market and more recently in Victoria. Our slow down of sales over the past months makes our original estimates for the new

¹⁷⁵ Jack Green Annual Report 2005/2006 Managing Director's Report Andrew Randall

fiscal year unachievable. The plan however to reach 100,000 customers within a reasonable period of time has not changed.

The company can earn significant returns at this time with little reason to abate continued growth. We have a committed and expert management team that have these key aims firmly set.

We want to continue to push our advantage as being Australia's dedicated renewable energy retailer. We are confident this will create strong returns for our shareholders and give them the satisfaction of an investment in an organization that is making positive change for our environment and community.

Thank you for your support to date and we look forward to converting our work into solid shareholder growth in the future.

By comparison, the highlights of the Annual Report in the following year, ending 2007 were as follows:

The Highlights

Grew revenue by 454% for the electricity retail business and 210% for the consolidated group.

- Commenced supply of electricity to retail customers in South Australia in May 2007.*
- Received licences to retail Electricity in Queensland, on the commencement of Full Retail Contestability in July 2007, and the Australian Capital Territory, as well as a licence to retail Gas in the ACT.*
- Encountered the first and third most expensive wholesale electricity months in the history of the National Electricity Market in April and June 2007 respectively. The costs in June were three times higher than the previous highest ever month in the NEM.*
- Wound up the property related subsidiaries, ensuring all future resources can be dedicated to the expansion of the electricity business.*

I repeat what was included in the introduction to keep this section intact and complete.

Chairman of Jackgreen, John Smith in the 2007 Annual Report speaks with a mixture pride and pain – pain over the disappointments. He is to be commended for his honesty and modesty in recognizing the downsides of being a small company in an unstable regulatory climate with an unstable participant market in the face of repeated mergers, acquisitions and of imminent price rises.

In the Jackgreen Annual report message 2007 He says:

“Small business attempting to build a customer community of users that care about the environment in a market that is disappointingly seen by politicians as an election ‘play thing’ and seen by industry regulators and managers as a custody candidate.”

We can all learn something from John Smith's frank opinion of the current state of the market.

It seems that it may take much more than regulatory custody and optimism that may not always be balanced by facts, figures, informed evaluative design, which does not start with data gathering, but rather with expert timely strategic planning.

He openly acknowledges the support of Babcock and Brown with an increased hedge and loan support.

Will the Australian Government be supporting new ventures and send-tier retailers with more than just a go-ahead to enter a free-range market, with free range prices, deteriorating infrastructure that will need replacing; growth load problems that remain unaddressed?

Will consumer and other stakeholder concerns be better heard and acted on next time round?

Though included in part in the introductory section, I continue to quote directly from Jackgreen's 2007 Annual Report:

"It has taken the Federal Government until recent months to even acknowledge that any harm is being caused. The State Governments are doing a reasonable job of setting emission goals and targets for a retailer like Jackgreen to achieve, but lack the funding to do anything about real incentives on the customer demand side.

So we have no "National" pricing regulation, though we do have a National Energy Market and supply grid based on the eastern seaboard and SA.

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!"

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.

The protection for such events is to pay hedge costs to smooth over the rises and falls in the market, at Jackgreen we had taken a conservative position and had hedged for normal deviations of market behaviour. The costs of extraordinary market behaviour, coupled with the cost of customer acquisitions caused us to record a loss for the year.

We have secured an increased hedge and loan support from Babcock & Brown and have established a call option to make certain that in the unlikely event of all our protections failing that the shareholder's value is protected.

We are grateful to Babcock & Brown for their continued support and shared vision of our impending successful achievement of profitability."

I repeat here my commendation to John Smith of Jackgreen for the stance he has taken, for his quiet optimism tempered with reservations about how the regulatory changes are occurring and the vulnerabilities of the smaller business trying to maintain their position in a market dominated by relative giants, a climate of uncertainty and instability and massive apparently rushed regulatory reform and stakeholder consultation.

Stakeholders from all sides of the fence need to be more involved, be given more time to make inputs and to be listened to rather than simply heard.

We need to take care of the smaller entrants into the market and not just leave them to swim.

By the same token we need to take care of vulnerable consumers, and everybody else who is small but hopeful – or not

Jack Green now boasts of progress from almost 50,000 customers to their interim target of 100,000 happy customers. The company will add new products and services and increase efficiency and productivity in the billing and collections area.

Analyst Foster Stockbroking reported on 8 August 2006¹⁷⁶ some cashflow concerns which are reproduced here not to dampen enthusiasm but as a caution to making premature and unrealistic predictions about any second-tier retailer in the current climate of instability.

“Concerns regarding cash flow: We are concerned that the positive cashflow achieved during the month of June may not be sustainable into the next quarter. In the response to the ASX query of August 1st the company stated that it “expects a reduced rate of operating cash outflows in the next quarter as a result of the growth in customers”.

This comment suggests that cashflows are likely to slip back into negative territory as the sales campaign ramps up. As the company currently has only \$1.9m cash in hand, we cannot discount the possibility of a further capital raising.”

“Revised forecasts: We have scaled back our total subscriber number forecasts for FY06, FY07 and FY08 by 31%, 36% and 30% respectively as a result of lower average monthly acquisition assumptions for household electricity clients. We have pushed back the commencement of gas sales and SME markets until FY08.”

“Our FY06 NPAT forecast is virtually unchanged at a loss of \$6.6m with revenues from the now defunct property development business offsetting the short fall in electricity sales. Going forward, we have reduced our FY07 NPAT forecast by 55% to \$0.5m reflecting the diminished subscriber base and the costs involved in reinvigorating the marketing campaign. Similarly we have lowered our FY08 NPAT forecast by 42% to \$2.8m.”

Foster also reported that there were some operating issues that the company has described as “teething problems related to subscriber transfers and the billing system. Sales growth was slowed in order to provide the company with an opportunity to ensure that the operational resources were robust.

Jackgreen has also shed most of its real estate commitments so it is early days to make any real predictions.

Revised Average Monthly Customer Acquisition Forecasts

March 06 - June 06 Old f'cast 4,125 New Forecast 500 Difference 88%

FY07 Old f'cast New Forecast 3,830 Difference 2,417 37%

FY08 Difference 3,040 Difference 2,541 Difference 16%

FY09 Old f'cast 1,250 New Forecast 1,250 Difference 0%

FY10 Old f'cast 1,250 New Forecast 1,250 Difference 0%

Source: Foster Stockbroking estimates

Subscriber growth the cash flow reservations have instilled some caution and Foster's has predicted that the company's future hinges on its ability to ‘hit the road’ and build up the customer base at a

¹⁷⁶ Investor Analyst Foster Stockbroking 8 August 2006 found at <http://www.Jackgreen.com.au/investor.php>

similar rate that was achieved during January/February 2006, whilst adhering to its touted low operating cost mode.

On 6 November 2007 issued a notice to the Australian Stock Exchange that Jackgreen had completed an issue of 12 cent convertible notes raising \$1.8 million. The funds raised by the issue of notes will be used to fund the additional credit support required by NEMMCo as a result of a recent review of all industry participants' credit support calculations.¹⁷⁷

MOMENTUM ENERGY¹⁷⁸

On **24 July 2007** Momentum Energy transferred **15,000 unhedged** residential customers to Australian Power and Gas in order to get out of that market.

As commented above, in Jackgreen's Annual Report

"In one fell swoop, the contestable market lauded by successive Governments had come back to bite them."

Momentum Energy describes the transfer on the basis of responding to the recent increases in the cost of purchasing wholesale power, making it difficult for them to continue with their low prices.

On 24 July 2007 Australian Power and Gas purchased from Momentum Energy their 15,000 unhedged Victorian customers – a market that Momentum could no longer afford because of wholesale prices.

APG explains the transfer of **15,000 customers** from Momentum to APG as a distressed sale narrowly missing a Retailer of Last Resort Event (RoLR). The acquisition was secured at well below recent energy industry acquisition price.¹⁷⁹

APG has published the purchase price is **\$1,000,000** with \$750,000 payable now and the balance due on **30 December 2007** subject to variations for any customer losses. This represents an acquisition cost under \$67 per customer account.

The new acquisition brings APG's total customer account base to approximately 45,000 since commencement of sales in February 2007. If a RoLR had occurred it would have been the second such event in Victoria in a matter of months.

To reassure the public Momentum Energy has answered on their website some pressing questions about what is happening to Momentum. They have guaranteed business as usual for non-residential customers, and have stressed that the transfer of customer accounts only affects their Victorian residential customers

They have assured their customers of the standing of Australia Power and Gas as a publicly listed company of the Australian Stock Exchange purchasing wholesale electricity from a "*strong and stable position in Victoria*". Therefore the customers AGP would be better placed "to maintain (your) current supply arrangements, securing a three-year price agreement with their wholesaler for their Victorian electricity purchases that isn't affected by the fluctuating price of wholesale electricity.

¹⁷⁷ <http://www.Jackgreen.com.au/investor.php>

¹⁷⁸ Momentum website

¹⁷⁹ Media Release Australian Power and Gas 6 July 2007

http://www.australianpowerandgas.com.au/files/pdf/Momentum_Release.pdf

Momentum Energy Pty Ltd is an electricity retail company dedicated to giving Victorian/South Australian households and businesses an alternative energy retail offer. Momentum Energy gained its Victorian and South Australian retail licence in 2004 and its management team enjoys many years' experience in retail electricity in Australia and overseas.

As a result of deregulation, Victorians and South Australians have the freedom to choose their power supplier. With choice and better service -better prices will be delivered to the consumer. Momentum hopes to offer gas supply in the future.

Momentum's describes its benefits as including no connection fees as long as there is active electricity supply at the property; no bond, subject to meeting their credit criteria; and continuity of meter reads as currently or each quarter. Momentum's product offers include 10% discounts and instant loyalty credit after one year.¹⁸⁰

More than 50% of the \$400m+ Integral Energy spends each year on goods and services are covered by Integral Energy or State Contracts Control Board (NSW Department of Commerce) contracts or supplier panels, the typical duration of which is 3 years. Examples of goods and services that are presently covered by Integral Energy contracts or supplier panels include distribution transformers, switchgear, minor civil works construction, vegetation management and recruitment.

In Jackgreen's Annual Report 2007 Chairman John Smith states that:

"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.

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."

POWERDIRECT second-tier retailer (taken over by Ergon Energy, taken over by AGL)

National electricity retailer with offices in Victoria, Queensland, South Australia and NSW

Powerdirect specializes in supplying Australian households and large corporations with a focus on business customers. Can deal easily with multi-site customers. Good rates for and specialized service to small to medium enterprises. Business customers with competitive pricing and a dedicated customer support team. Can supply most customers connected to the National Electricity Grid. Can assist multi-site customers seeking to manage energy needs through one retailer. Boasts value for money and innovative solutions.

INTEGRAL ENERGY¹⁸¹

Integral Energy's website contains the following information¹⁸²:

"Integral Energy is the second largest state-owned energy corporation in NSW, incorporated under the Energy Services Corporations Act 1995.

Originally established to supply electricity to the Western Sydney and Illawarra regions of NSW, we also operate in Queensland, and today hold licences to retail electricity in all of the regions in Australia covered by the National Electricity Market (NEM).

¹⁸⁰ Momentum website <http://momentumenergy.staging.wdg.com.au/business/what-we-offer.aspx>

¹⁸¹ Integral energy website

¹⁸² Home page Integral website <http://www.integral.com.au/wps/wcm/connect/integralenergy/home/home/>