

16 March 2009

SCOCA Australian Consumer Law Consultation
Competition and Consumer Policy Division
Treasury
Langton Crescent
PARKES ACT 2600
australianconsumerlaw@treasury.gov.au

Thank you for the opportunity to comment on the Standing Committee of Officials of Consumer Affairs Paper *An Australian Consumer Law Fair markets — Confident consumers* 17 February 2009.

The Energy & Water Ombudsman NSW investigates and resolves complaints from customers of electricity and gas providers in NSW, and some water providers.

EWON believes that the move to develop a new Australian Consumer Law is a positive outcome of the Productivity Commission's Inquiry into the Consumer Policy Framework for Australia. In particular EWON strongly supports the need for a nationally consistent approach to the issue of unfair terms in standard consumer contracts.

EWON has previously commented in depth on this issue and has provided case studies in our submission to the *New South Wales Legislative Council Standing Committee on Law and Justice: Inquiry into Unfair Terms in Consumer Contracts*, October 2006 and in the submission by the Australia & New Zealand Energy and Water Ombudsman Network (ANZEWON) to *The Productivity Commission Consumer Policy Framework Issues Paper* January 2007. Copies of these submissions are attached for your information.

EWON would also endorse the proposal for the Australian Consumer Law to modify and augment existing generic consumer protection legislation to ensure national consistency if these moves seek to incorporate best practice in consumer protection.



Energy & Water
Ombudsman NSW

PO Box K 1343
Haymarket NSW 1240

Admin (02) 8218 5250
Fax (02) 8218 5233
Freecall 1800 246 545
Email omb@ewon.com.au
Web www.ewon.com.au

ABN 21079 718 915

If you would like to discuss this matter further, please contact me or Chris Dodds, Senior Policy Officer on 82185250.

Yours sincerely

A handwritten signature in black ink that reads "Clare Petre".

Clare Petre
Energy & Water Ombudsman NSW



Energy & Water
Ombudsman NSW

PO Box K 1343
Haymarket NSW 1240

Admin (02) 8218 5250
Fax (02) 8218 5233
Freecall 1800 246 545
Email omb@ewon.com.au
Web www.ewon.com.au

ABN 21079 718 915

Attachment A

EWON Submission to the *New South Wales Legislative Council Standing Committee on Law and Justice: Inquiry into Unfair Terms in Consumer Contracts*, October 2006



Energy & Water
Ombudsman NSW

PO Box K 1343
Haymarket NSW 1240

Admin (02) 8218 5250
Fax (02) 8218 5233
Freecall 1800 246 545
Email omb@ewon.com.au
Web www.ewon.com.au

ABN 21079 718 915

11 October 2006

Standing Committee on Law and Justice
Parliament House
Macquarie St
Sydney NSW 2000

Thank you for the opportunity to provide a submission to the inquiry into unfair terms in consumer contracts currently being conducted by the Legislative Council Standing Committee on Law and Justice.

The Energy & Water Ombudsman NSW investigates and resolves complaints from customers of electricity and gas providers in NSW, and some water providers. A number of these complaints involve difficulties faced by customers regarding the terms of their connection or supply contracts.

EWON's experience suggests that there are particular issues that the Standing Committee may wish to consider when examining contracts that supply essential services such as electricity, gas and water. We have limited our response to the terms of reference to those matters that our experience suggests will have the potential to most impact customers, particularly those who are already in vulnerable circumstances.

If you would like to discuss this matter further, please contact me on 8218 5250, or Brendan French, Deputy Ombudsman, on 8218 52651.

Yours sincerely

A handwritten signature in blue ink that reads "Clare Petre". The signature is written in a cursive, flowing style.

Clare Petre
Energy & Water Ombudsman NSW



Energy & Water
Ombudsman NSW

PO Box K 1343
Haymarket NSW 1240

Admin (02) 8218 5250
Fax (02) 8218 5233
Freecall 1800 246 545
Email omb@ewon.com.au
Web www.ewon.com.au

ABN 21079 718 915

*New South Wales Legislative Council Standing Committee on
Law and Justice*

Inquiry into Unfair Terms in Consumer Contracts

October 2006

Submission by the

Energy & Water Ombudsman NSW

10 October 2006

<u>Introduction</u>	5
<u>A review of the Victorian and UK Regulations</u>	7
<i><u>The operative provisions</u></i>	7
<i><u>The possible inclusion of small business customers</u></i>	8
<i><u>The assessment of what is an unfair contract term</u></i>	10
<u>The need for regulation in NSW</u>	11
<i><u>The use of standard form contracts in the energy and water markets</u></i>	11
<i><u>The use of terms which penalise the consumer but not the supplier when there is a breach of the agreement</u></i>	12
• <u>1. Contract termination fees</u>	12
• <u>2. Disconnection of supply</u>	13
<i><u>The use of terms which allow the supplier to unilaterally vary the price or characteristics of the services without notice to the consumer</u></i>	15
• <u>1. Contract “rollover” provisions</u>	15
<i><u>Third party acceptance of contract offers</u></i>	17
<i><u>The use of terms which cause a significant imbalance in the parties’ rights and obligations arising under the contract, to the detriment of the consumer</u></i>	20
• <u>1. The absence of “negotiated” terms and the imbalance of power</u>	20
• <u>2. The use of exclusion clauses to limit the liability of suppliers</u>	20
<i><u>Confused customers – insufficient disclosure of contract terms by energy and water suppliers in NSW</u></i>	23
<u>Conclusion</u>	25

Introduction

The Energy & Water Ombudsman NSW (EWON) is the approved industry ombudsman under section 96B of the *Electricity Supply Act 1995* and section 33G of the *Gas Supply Act 1996* and also receives and investigates complaints from customers of the major NSW water providers. While we are not in a position to comment on all areas raised in the terms of reference, we have provided comments in relation to our observations of the use of contracts in the energy and water industries. We have provided these comments from the perspective of EWON's experience as an independent dispute resolution mechanism for energy and water customers in NSW.

The inquiry into unfair terms in consumer contracts is particularly relevant to the energy and water industries in NSW. At present, all consumers who wish to be supplied with electricity, gas or water are required to accept a contract for that supply. There are therefore substantial numbers of consumers who are taken to have accepted contracts for supply of essential services. However, it is EWON's experience that most consumers do not see or read, let alone negotiate, the terms of these contracts. There is presently a strong focus on further deregulation of the energy and water markets. To date, deregulation of the energy markets has been the catalyst for increased complexity for the consumer. A deregulated energy market has led to increased use of "negotiated" contracts by suppliers, and this in turn has led to confusion and complaints from many consumers, as such contracts are still relatively new to most consumers. At present there is limited regulation to protect consumers in this regard.

The 2005/2006 financial year has seen a substantial increase in the numbers of complaints regarding energy competition received by EWON. There was a 305% increase in issues involving the marketing of electricity and gas contracts, with complaints highlighting many consumers' negative experience of the sales process with marketers. Many consumers complained about marketers misleading or coercing them into a contract. Some consumers complained that their account had been transferred to another retailer without their knowledge or permission. Others were surprised to find their account cancelled without consent when another person in their household signed a contract.

Any practice of misleading consumers, or failing to provide them with accurate and comprehensive information about their contracts, hinders the creation of a positive, competitive energy market. The Minister for Water Utilities will soon be introducing legislation to State Parliament that would initiate the deregulation of the water industry in NSW. EWON anticipates that such a change will raise issues regarding the contracts used by water retailers.

In the deregulated energy market, there is increasing reliance on contract terms in the regulation of the relationship between energy suppliers and consumers. However, there is a significant potential for power imbalance between the parties. Consumers rely heavily on suppliers of energy and water to maintain their quality of life, and any loss of these essential services would severely impact individual consumers and families. The

contracts that govern the consumer-supplier relationship in these industries are drafted by the suppliers and it is probably fair to say that the contracts seek to operate for their benefit. Because the contracts involve the supply of essential services, EWON believes that the need for consumer protection in this area is particularly high, and we recommend consideration of legislation for New South Wales similar to the unfair contract terms legislation implemented in Victoria and in the United Kingdom.

A review of the Victorian and UK Regulations

The operative provisions

While there are slight differences in the wording of the unfair contract term regulations that have been implemented in Victoria and in the United Kingdom, the key provisions of each instrument appear to have very similar effects. That is, a term in a consumer contract is to be regarded as unfair if it causes a significant imbalance in the parties' rights and obligations arising under the contract, to the detriment of the consumer. The United Kingdom model differs from the Victorian model in that in the United Kingdom, a contract term can only be found to be unfair if it was not "individually negotiated"¹.

Although there is a difference in the construction of the operative provisions, in EWON's experience, it appears that regardless of which model is adopted, the effect of the law would be largely the same. In the vast majority of cases dealt with by EWON, there is no negotiation between the parties. Most domestic and many small business consumers in NSW are supplied electricity and gas under standard form regulated contracts. The consumer is taken to have accepted such a contract when they contact a supplier to open an account. No negotiation of the terms is entered into, and the customer often is not required to sign any document, as in most cases the supply arrangement is created over the telephone². Although there is increasing prevalence of "negotiated" market contracts (ie those that are offered by retailers other than the standard form contract of the local retailer), in EWON's experience this has not led to an increase in the number of customers negotiating their contract terms. Although they are labeled "negotiated" contracts, these documents are essentially standard form contracts in that they tend to be contracts of adhesion, which the consumer either accepts or does not accept.

A requirement that a contract term can only be found to be unfair if it has not been "individually negotiated" is likely to have little impact in the energy and water markets. However, we believe it is important that this issue is considered and clearly regulated. Suppliers are likely to debate whether or not a contract, or a particular term of the contract, has been "individually negotiated". Therefore, if NSW were to consider introducing an approach similar to that adopted in the UK, we would also recommend consideration of the provisions of regulation 5(2) of the *Unfair Terms in Consumer Contracts Regulations 1999 (UK)* in which certain terms are always regarded as not having been individually negotiated. In such a context we would also support the UK approach whereby the onus is on the supplier to prove that a particular term was not individually negotiated³.

¹ *Unfair Terms in Consumer Contracts Regulations 1999 (UK)*, regulation 5(1)

² The creation of a supply contract over the telephone is both reasonable and desirable given the need for essential services of electricity to be quickly accessible for consumers

³ *Unfair Terms in Consumer Contracts Regulations 1999 (UK)*, regulation 5(4)

The possible inclusion of small business customers

The operative provisions of the Victorian legislation apply to "consumer contracts", which are defined in section 3 of the *Fair Trading Act 1999* as agreements *whether or not in writing and whether of specific or general use, to supply goods or services of a kind ordinarily acquired for personal, domestic or household use or consumption, for the purposes of the ordinary personal, domestic or household use or consumption of those goods or services.*

The effect of this definition is that small business consumers are excluded from the protections afforded by the regulations.

EWON acknowledges the argument that business people ought to be mindful of the contracts they enter into, and are in a better position to assess the terms of a contract offer. However, we have received many complaints from small business consumers about the way in which a supplier has exercised its rights under the supply contract. The contracts offered by energy and water suppliers to small business customers are usually similar (or identical) to the contracts offered to residential customers. As such, small business consumers often find themselves in similar situations to those discussed in this submission regarding residential customers. Further, the considerable reliance of certain small businesses on energy and water places them at a significant disadvantage when trying to resolve disputes with providers, especially when the latter have strong sanctions available to them (eg disconnection of supply, credit listing). In EWON's experience, unfair contract terms may in certain circumstances have even more dramatic implications for small businesses than for residential customers.

Due to their status as small businesses, these customers tend to receive less consideration from energy and water suppliers when it comes to handling matters relating to the terms of their contracts. There may be several reasons for this, including the generally reasonable view that businesses are more likely to have experience in reading and/ or negotiating contract terms. However, just like residential consumers, small businesses have little or no choice regarding the terms of their contracts - they need energy and water to survive – and it is also quite likely that they have little or no experience in navigating the contestable energy market. This leads to a significant imbalance in power between the parties to the contract. The following case study illustrates one such difficulty faced by a small business customer:

MARIA'S STORY

Maria runs a small wholesaling food business so, even though hers is a very small enterprise, it uses a lot of electricity because of industrial refrigerators and cooling rooms. Recently she received a letter from her provider advising her that she was required to be supplied electricity under a market contract rather than the standard form regulated contract.

Maria asked the provider why they had not automatically offered her this contract when she opened her account, but did not receive a response. Maria then received a letter advising that unless she signed a contract, she would be charged "mandated" rates, which were significantly higher than the rates she had been paying.

Because she had not yet received a response to her query, Maria did not sign a contract. In response, her provider then issued her a bill on the "mandated rates". Maria contacted the provider to dispute this invoice and was advised that because she had not paid the bill by the due date she would have to pay a \$3000 security deposit in addition to the \$2600 "mandated rates" invoice. She was told that if she did not pay these amounts within one week, her premises would be disconnected.

Maria was very upset at this request, as electricity supply was vital for powering her freezers. She managed to pay the amounts under protest, and contacted EWON about the provider's actions. She felt that she shouldn't have to pay the higher "mandated rates" which weren't listed anywhere on the contracts she'd seen, and that she shouldn't have to pay a security deposit in these circumstances.

EWON believes that there would be benefit in ensuring that small businesses are included in NSW provisions protecting customers from unfair contract terms. In EWON's experience, small business consumers have been keen to participate in the competitive energy market, and we would anticipate that the introduction of unfair contract terms legislation could foster further participation in the market by small business.

EWON acknowledges that there may be a reluctance to extend the protections afforded by legislation to all contracts entered into by small business consumers. As such, we would suggest that, as a minimum, one alternative might be to expand the coverage of unfair contract terms legislation to include "small business consumers of electricity, gas and water"⁴ as well as all residential consumers. We believe that this minor expansion of the protections would have relatively little impact on the compliance costs of suppliers, but could potentially lead to significant reductions in contract problems faced by small

⁴ Note that under the *Electricity Supply Act 1995* and the *Gas Supply Act 1996*, consumers are not defined by their status as residents or small businesses. Rather, a customer is either a "small retail customer" or a "large retail customer" depending on the amount of electricity or gas consumed annually. There are other means to define a business as small or large, eg. through annual turnover (see s 6D of the [Privacy Act 1988](#) [Cth]) or staff size (the Australian Bureau of Statistics recommends a small business to be one that employs fewer than 20 people: see [Small Business in Australia, 2001](#)).

businesses and the prevalence of complaints to bodies such as EWON, the Office of Fair Trading and the courts.

The assessment of what is an unfair contract term

Section 32X of the *Fair Trading Act 1999* (Vic) deals with factors relevant to the assessment of whether a particular contract term is unfair. These include:

- whether the term was individually negotiated
- whether it is a prescribed unfair term under the regulations
- whether the term has the object or effect of:
 - permitting the supplier but not the consumer to avoid or limit the contract or terminate the contract
 - permitting the supplier but not the consumer to renew or not renew the contract
 - penalizing the consumer but not the supplier for a breach of the contract
 - permitting the supplier but not the consumer to vary the terms
 - allowing the supplier to determine the price without giving the consumer the option to terminate
 - limiting the consumer's right to sue the supplier.

The United Kingdom regulations contain a Schedule that provides an indicative list of terms that may be regarded as unfair. This list appears similar to some of the factors listed in the Victorian legislation.

EWON recognizes that there is utility in providing a list of factors that are relevant in considering whether a particular term is unfair, and would support either the Victorian or the United Kingdom approach in this regard. EWON has identified a number of terms in electricity and gas supply contracts that significantly alter the rights and obligations of the parties to the contract to the detriment of the consumer. The factors identified in both the Victorian and United Kingdom legislation as being relevant to the consideration of a particular contract term appear to be in accordance with the types of terms which EWON considers may be “unfair”. Some examples of these are given further below.

The need for regulation in NSW

EWON believes that the introduction of unfair contract term legislation/ regulations in NSW would benefit both consumers and suppliers, and would foster a positive, competitive market.

There are factors in the energy market at present that indicate a need for such regulation, including:

- the wide scale use of contracts in the energy supply industry, and the increasing use of unregulated market contracts
- the use of contract terms that may be “unfair contract terms” under the Victorian and United Kingdom models
- features that pose difficulties for consumers in understanding the way in which energy contracts work.

These issues are discussed below, with case studies provided to highlight typical issues faced by consumers.

The use of standard form contracts in the energy and water markets

All electricity and gas consumers in NSW are supplied under a “customer connection contract” and a “customer supply contract”. The customer connection contract is a contract with the electricity or gas network for the provision of the network services associated with the sale of electricity and gas. The customer supply contract is with an electricity or gas retailer for the sale of the electricity or gas itself. Traditionally, each of these contracts was with the same company – the network service provider for the area. At present, water consumers in NSW are supplied water under a single contract with their provider, whether it be a state owned corporation such as Sydney Water, or a local council.

A layer of complexity has arisen in recent years with deregulation of the energy industry. In the past, electricity and gas supply was essentially a monopoly service, with consumers being compelled to take supply from the deemed provider for their geographical location. However, since 1 January 2002, consumers have been able to choose their energy retailer irrespective of the area in which they live. The customer connection contract is still dependent on the customers’ geographical location, as the network provider remains the same, but customers can choose to take out a “negotiated” customer supply contract with a retailer other than the default network provider. The move to deregulation has opened the market to many other retailers, and each retailer brings with it its own “negotiated” contract.

Although consumers are to some degree accustomed to the reality of contract terms when it comes to large purchases (cars, houses etc), they have not historically been required to think of utility accounts in the same way. EWON’s experience is that although most

energy customers in NSW are bound by standard form contracts, only a tiny minority are aware of the fact, let alone aware of the terms under which they are supplied – until such time, for instance, as a compensation claim is denied ‘on contract grounds’. In a newly-contestable energy market the learning curve for consumers, and the utilities themselves, has been very steep. These contracts are for the most part unregulated and it is clear from our experience that there is significant potential for elements to be included that are unfair to consumers.

The use of terms which penalise the consumer but not the supplier when there is a breach of the agreement

Contract termination fees

Many of the negotiated contracts for the supply of energy are duration-based contracts. Often these contracts contain terms that penalise the consumer but not the supplier for breach or early termination of the contract⁵. The provisions of the negotiated contracts in the market appear to be relatively similar across providers, and some such provisions are outlined below:

Provider Z General terms for Gas and Electricity Market Contracts (Feb 2006)

3.1.1 If this Energy Plan is terminated before the expiry of the term of your Energy Plan, we may charge you an Early Termination Fee set out in the Offer to reflect our costs of processing the termination and any other loss or damage suffered by us due to your early termination.

...

4.1.1 We may disconnect the Supply Address or request that the distributor disconnect the Supply Address if you do not pay for any charges incurred at your current or any previous supply addresses.

Provider Y Energy Contract Information (Mar 2004)

10 Terminating this Contract

If, in respect of a type of energy:

- *this contract is terminated by you or us, or*
- *supply is discontinued or the premises are disconnected or we commence the process to do so,*

with effect before the end of the term for that type, then you indemnify us against (and therefore must pay us for) loss or damage that results from that event...Loss and damage includes our administration costs, special meter reading charges, disconnection fees, loss of profits, and costs we incur in continuing to comply with, renegotiating or cancelling contracts and arrangements with ... the network operator.

⁵ Under section 32X(c) of the *Fair Trading Act 1999 (Vic)*, this consideration is a factor to be considered in assessing whether a particular term is unfair.

Provider X Negotiated Supply Agreement Terms and Conditions (Jul 05)

12 If this Agreement is terminated by us under this condition 12, or by you under the election provision in condition 2, in respect of all of the properties subject to this Agreement and with effect before the end date, then you must pay us the early termination fee. You acknowledge that this fee is a genuine pre-estimate of our losses incurred as a result of early termination of this Agreement...

In EWON's experience, none of the negotiated contracts offered by suppliers in NSW provide penalties against the supplier for early termination of the contract. This is clearly a significant imbalance in the parties' rights under the contract, and the imposition of penalties on consumers arguably amounts to an unfair contract term under the Victorian and United Kingdom legislation.

EWON has received significant numbers of complaints involving the application of termination fees. In some of the early cases received on this issue, the supplier sought to recover all presumed consumption (and other) charges for the remainder of the contract period. This meant that some customers, who had signed the contract on the promise that it would save them \$90 or thereabouts over three years, ended up paying hundreds (or, in the case of small businesses, even thousands) of dollars to terminate the contract early.

The issue of termination fees poses additional problems. If a supplier attempts to enforce payment of a termination fee through either disconnection of supply or credit listing, they are potentially seeking to enforce (via significant legal sanctions) what may well be unfair terms. This is clearly an unacceptable situation for consumers in NSW.

Although many suppliers argue that the imposition of termination fees on customers is an attempt to recover the reasonable costs of losing the customer's contract, the effect is that the termination fee penalises the consumer for breaching the contract. Studies undertaken by the Victorian Essential Services Commission indicated that in many cases the actual quantum of the termination fee was well above the actual costs incurred by the supplier involved, and in some cases the supplier actually made a significant profit on the termination fees⁶. As there are no such provisions penalising suppliers for breaching the contract in NSW or recovering well in excess of their reasonable losses for early cancellation, EWON suggests that regulation is needed to level the playing field for consumers.

Disconnection of supply

One of the key enforcement mechanisms granted to suppliers under the terms of energy and water contracts is the ability to disconnect or restrict supply. As energy and water are "essential services", suppliers hold a powerful tool - the ability to take away the service - for persuading consumers to do, or refrain from doing, a particular action. The following

⁶ Essential Services Commission, [Early Termination Fees Compliance Review](#) (Issues Paper 05/07/2005; Preliminary Findings 05/04/2006; Draft Determination 30/07/06)

list outlines some examples of the events which enable a supplier to disconnect a consumer under the terms of a regulated standard form customer supply contract:

Supplier A Standard Form Customer Connection Contract (October 2002)

We may arrange to disconnect your property if:

- *you do not pay on time any amount due to us under this contract for the supply of electricity or connection services arranged by us*
 - *you do not provide the security that we require*
 - *you otherwise fail to comply with the terms of this contract*
 - *a receiver, administrator or liquidator is appointed for any of your assets*
 - *you refuse or fail to give an authorised person access to your property in accordance with any rights of access provided for in the Electricity Supply Act*
 - *you obstruct an authorised person in relation to anything in connection with this contract*
 - *you assign your rights under this contract without first obtaining our consent (which may be given or withheld at our discretion) or you vacate your property.*
-

Aside from the consequential costs to customers of the disconnection, suppliers are also able to charge customers disconnection/ reconnection fees to recover costs of carrying out the disconnection. These fees, regulated by the Independent Pricing and Regulatory Tribunal, tend to range between \$50 and \$100, and are often a prerequisite for reconnection of supply.

Most ‘unrequested’ disconnections of electricity, gas or water occur as the result of non payment of accounts. The consumers who are most likely to have their energy or water supply disconnected are those consumers who are already in vulnerable circumstances. In EWON’s experience, these consumers are often receiving Centrelink payments, living in public or private rental accommodation, and are often facing very significant social and economic challenges. Disconnection of energy or water supply is unlikely to improve a consumer’s ability to pay their bills on time, rather it is likely to lead to essential services being out of reach for many consumers, particularly if administrative charges (eg late fees, disconnection fees) are added to the consumption and service charges. As such, EWON would support the introduction of unfair terms legislation to encourage discussion of alternative options for suppliers, and to enable regulatory bodies to improve the protection afforded to vulnerable consumers. This is particularly important at present as disconnection rates for electricity and gas in NSW are concerningly high. The most recent publicly available data suggests that 26,872 customers were disconnected for non-payment in 2004-05, a rise of 25% in one year.

The use of terms which allow the supplier to unilaterally vary the price or characteristics of the services without notice to the consumer

Contract “rollover” provisions

EWON has received a number of complaints from customers about the “rollover” of the contract at the end of the contract term. The following are some examples of the “rollover” provisions of some negotiated contracts reviewed by EWON:

Supplier X Negotiated Supply Agreement Terms and Conditions (Jul 05)

7 This Agreement may be extended for further periods on the following terms.

We will notify you at least 28 days before the earliest end date is to occur (the “Contract end date”).

At this time, we may (but are not required to) send you a proposal to extend this Agreement for a further period (“renewal proposal”). The renewal proposal will identify the period over which the Agreement may be extended (the “renewal term”). ... If you do not reject this renewal proposal at least 14 days before the Contract end date, you are taken to have accepted the renewal proposal and this Agreement will continue on the same terms except as varied by the renewal proposal and except that the end date will be the last day of the renewal term.

Provider Z General terms for Gas and Electricity Market Contracts (Feb 2006)

2.4.2 At least one month, but no more than two months, before the expiry of the term of your Energy Plan, we will:

- (a) notify you that the term of your Energy Plan is about to expire, and the date of that expiry;*
- (b) notify you of the charges, terms and conditions that will apply to you if you do not exercise any other option once the term of your Energy Plan has expired...*
- (c) notify you of your other options once the term of your Energy Plan has expired, which will include,*
 - (i) entering into a standard form contract with your standard supplier*
 - (ii) entering into any negotiated contract offered to you by us or another supplier, or*
 - (iii) requesting disconnection.*

...

2.4.4 If you do not exercise any of the options in the manner set out in clause 2.4.2 above, before the expiry of the term of your Energy Plan, then from the expiry of the term of your Energy Plan, the charges, terms and conditions set out in the notice will apply and will form a new Energy Plan.

Provider Y Energy Contract Information (Mar 2004)

3 Extending the term

We may send you an offer not less than 60 days before the end of the term containing a proposal to vary this contract by extending the term on terms we specify (including various amounts payable). If you do not reject that offer within 30 days after receiving the offer, you are taken to have accepted the offer and this contract is to be varied accordingly.

Many customers have been unaware of the rollover provisions of the contract, often because reference to this provision is not highlighted or easy to understand. EWON has had a number of complaints from customers who have been deemed to have accepted a new contract even though they had not received any notice of the renewal. In these cases, the supplier has effectively been able to unilaterally vary the terms of the contract, which would arguably amount to an unfair contract term in light of the Victorian and United Kingdom regulations. The following cases are typical illustrations of the effect of rollover provisions on residential customers:

STEVE'S STORY

Steve was being supplied electricity by Provider A under a negotiated contract that was due to expire in July 2005. After July 2005, he contacted Provider B and took up a new 3 year contract. His final bill from Provider A had a \$95 early termination fee on it.

Steve was confused as to why this fee had been charged, as he believed the contract with Provider A had expired. EWON investigated the matter and found that Provider A had "rolled over" Steve's contract in early July 2005. Steve had not received any correspondence regarding this rollover, and EWON negotiated with Provider A to waive the termination fee that had been charged.

DINO'S STORY

Dino's contract with Provider B was for 3 years. Provider B wrote to Dino before the expiration of the term to advise that he had the choice of continuing with them, or changing to another supplier. Dino did not respond to this letter and the contract was extended.

EWON's investigation found that the terms of the initial contract stated that the contract could be extended for 12 month periods, however Provider B's letter to Dino purported to extend the contract for another 3 years. In the circumstances, Provider B agreed to waive the termination fee that would have applied to the new contract.

Rollover of contracts can assist many customers continue their supply arrangements with little effort or inconvenience for them. However, EWON's experience is that the opt-out provisions that are utilised by energy providers to renew or rollover contracts can be unreliable. Many customers state that they did not receive the letters and were thus unaware of the impending rollover. We acknowledge that in some cases letters have been sent by retailers, but they have gone astray in the mail or elsewhere, or customers may not pay attention to them on the assumption that they are advertising material. In some cases it is not possible to confirm that the letters were sent in the first place, as customer records held by retailers typically do not record mail-outs of this nature. EWON suggests it is unfair that contracts are rolled over without the explicit agreement of the consumer, particularly where any provisions of the contract are varied.

We note in particular that one of the key terms of the contract that is often altered in the "rolled over" contract is the tariff that applies to the energy supply. It is usually the case that the supplier changes the applicable tariffs under the contract when the contract is renewed. By implementing such a change in a "rolled over" contract, in some cases the supplier has effectively varied the price of the goods without the notice of the consumer.

We suggest that there needs to be a higher standard met by suppliers before they rollover contracts in this manner, and that rollover provisions in any contract should be clear, transparent and obvious to the customer. If a high standard of information is met by retailers, it is then reasonable to expect customers to take responsibility for either agreeing to the rollover and any changed provisions, or advising the retailer in due time that they do not wish to proceed with a further contract.

Third party acceptance of contract offers

EWON has been contacted by a number of domestic and small business customers who have had their original energy account closed as a direct result of a third party – either a spouse or fellow occupant of the property – signing a new negotiated contract in response to direct marketing activity.

We have seen a range of different scenarios:

- the new account is opened in the name of, but not in fact *by*, the original account holder
- the new account is opened in the name of the third party who signed the contract
- the new account is for a three-year contract with the original retailer
- the new account is for a three-year contract with a new retailer

All have in common the fact that the original account holder has not signed the new contract nor authorised the closure of their existing account. If they want to cancel the new contract and return to their original retailer, they may be liable to pay a termination fee, as they often do not discover the existence of the new contract until well after the expiry of the 10-day cooling off period.

A number of the negotiated contracts we have seen contain warranty statements that some retailers consider sufficient to support this practice:

Retailer A Negotiated Contract (Jan 05)

You also warrant that you are the account holder or are authorised to accept this offer on behalf of the account holder.

Retailer B Negotiated Contract (Oct 04)

When signing for a customer, the signatory warrants that they are authorised to do so.

Retailer C Negotiated Contract (Oct 03)

If signing for a residential account I am warranting that I am over 18 years of age and that I am an owner or occupier of this property.

EWON has received large numbers of complaints from consumers whose contracts had been terminated as a result of a non-account holder signing a contract with another supplier. This can be a particularly complex area for consumers, and the person whose account has been cancelled often experiences substantial difficulty obtaining information about the cancellation due to privacy laws. The following case studies illustrate the problem:

CHRISTINE'S STORY

Christine was visited by some electricity marketers from Provider A. She told the marketers that she was not the account holder for the premises and would prefer if they could leave some information for her husband (the electricity account holder) to consider. Despite her protests, the marketers asked her to sign a document confirming that they had left her some information.

Christine's husband then received a letter from his electricity retailer advising that his account had been closed. Christine was very upset at this as she had not consented to the transfer of the account, and felt that she was not authorised to do so.

EWON discussed the matter with the old and new retailers and was able to negotiate the cancellation of Christine's account, and the re-opening of her husband's account.

LEE'S STORY

Lee called EWON on behalf of his father who had recently received a final notice from his energy supplier, saying the account had been transferred to a new retailer. Lee's father was concerned as he had not requested the transfer and wasn't sure how it could have happened without his authority.

Lee explained that his father owned a property with six units which were rented to individual tenants. There was only one meter for the whole property, so Lee's father paid the electricity bills for all the units. He was having difficulty sorting out the problems with the original retailer because he was told that due to "privacy laws" the company could not tell him who the new account holder was.

EWON worked with Lee and the new and former retailers to establish how the transfer came about, without infringing the privacy of the tenants. We discovered that when the most recent tenant had signed a lease with the real estate agent, they mistakenly checked a box saying they wanted an electricity account set up. When informed of the issue, the real estate agent arranged for the tenant to contact the new retailer to confirm the error. The new retailer accepted that the contract had been established in error, agreed to cancel it and waived the termination fee.

The account for Lee's father was returned to his original retailer. Lee indicated that he would speak to the real estate agent about amending the lease form to avoid the problem of the unwanted transfer happening again.

EWON believes the warranty terms referred to above are unfair on consumers. As noted above, retail competition in the energy supply market is relatively new to many customers, and in EWON's experience, marketers representing energy companies do not always adequately explain contracts to consumers. There is currently no regulation that renders the warranty terms that enable non-account holders to sign binding contracts unfair or void. Therefore, we are left with a situation in which there can be third party alteration of contractual rights. This situation is clearly unsatisfactory, and EWON suggests consideration of legislation/regulation to render such purported warranties "unfair terms".

The use of terms which cause a significant imbalance in the parties' rights and obligations arising under the contract, to the detriment of the consumer

The absence of "negotiated" terms and the imbalance of power

EWON's experience in the review of the terms of electricity and gas contracts has indicated that there is little to no "negotiation" of any contract terms by consumers. Given that electricity and gas supply are essential services, consumers are left with little choice if they do not agree to a particular contract term. The bargaining power of the small consumer is very weak, while the supplier can effectively control the quality of life of the consumer by discontinuing supply. In these circumstances, there is very little choice for consumers, and it is open to suppliers to include those contract terms they see fit.

While many customers are supplied under standard form "regulated" contracts, there is no regulation of the actual terms of those contracts, and there are many terms added to these contracts that are not required by the regulatory bodies.

There are currently no checks and balances on these contract terms, and most customers are not in a position to test the contracts in a court of law. By implementing unfair contract term legislation, other dispute resolution agencies, such as EWON and the Office of Fair Trading would be in a position to deal with such cases more effectively – to the benefit of all parties.

The use of exclusion clauses to limit the liability of suppliers

Standard form customer connection contracts are written by the network providers themselves, and often contain waivers of liability for all manner of network events. While it is clear that a number of network events (particularly those relating to extreme weather conditions, or other "acts of God") are beyond the control of the network company, a number of the waivers contain elements that are somewhat surprising. The following extract is an example of some of the restrictions included in such connection contracts (emphasis added):

Retailer B Standard Form Customer Connection Contract (Feb 05)

16.3 Exclusion of liability for supply interruptions, distortions or fluctuations
Subject to the above, and as far as the law permits [Retailer B] is not liable for any loss the customer may suffer (including, without limitation, where caused by any negligent or wilful act or omission by [Retailer B]) arising from:

- b) any fluctuation or distortion (in voltage magnitude, voltage waveform or frequency) or interruption to the supply (by the customer's retail supplier) of electricity to the customer's premises or from any such supply not being or remaining continuous;*
 - c) the customer's retail supplier discontinuing supply of electricity to the customer; or*
-

-
- d) *[Retailer B] interrupting the supply of electricity by the customer's retail supplier to the customer's premises.*

16.4 *To the extent that [Retailer B] has any liability to the customer despite the effect of paragraph 16.3, [Retailer B]'s liability (under contract, tort or any other basis), is limited, as far as the law permits, as follows:*

- a) *[Retailer B] is not liable for any indirect, economic, special or consequential losses of any kind suffered by the customer (including corruption of data losses, business interruption losses, loss of profits or any other indirect costs of any kind), and*
- b) *[Retailer B]'s liability for all other losses suffered by the customer is limited to the lesser of:*
- i. *The total amount billed to the customer's retail supplier (or to the customer under clause 7.4) for network charges relating to the use of [Retailer B]'s distribution system for the supply of electricity by the customer's retail supplier to the customer's premises) during the year that [Retailer B]'s breach, act or omission (which gives rise to the claim) occurred, or*
 - ii. *\$5,000 (GST inclusive, if any),*
- for all claims the customer makes in any one calendar year.*
-

Such exclusion clauses are frequently relied on by suppliers to deny claims submitted by customers for compensation for damaged appliances. The denial of the claim can have a significant effect on customers, and the operation of the exclusion clause certainly attempts to limit “the consumer’s right to sue the supplier”⁷.

In our experience there appears to be no consistency in the terms of the various connection contracts applying across NSW, or in the internal policies that are used by suppliers to assess claims. Often consumers are reliant on the good will of the supplier in paying compensation for damaged goods, and it does not seem reasonable that there should be differences in the criteria used to assess the claim based on the location of the consumer.

In our view there does not appear to be any sound reason for an inconsistent approach by electricity suppliers in NSW to customer claims for damage measured against reasonable minimum standards. We cannot see any competitive advantage to a different approach by suppliers, and it does not seem equitable for customers to be treated differently in relation to claims depending on the distribution area in which they live. We have called for discussion of these issues by relevant stakeholders, including electricity distributors, regulatory bodies, and consumer groups.

⁷ Under section 32X(k) of the *Fair Trading Act 1999 (Vic)*, this consideration is a factor to be considered in assessing whether a particular term is unfair.

In the absence of any clear guidelines for customer claims in NSW, it has been left to EWON to investigate claims which have been denied by distributors. Since 1998, the Energy & Water Ombudsman NSW has made 54 Determinations under clause 6.1 of the EWON Constitution. Of these, 53 have related to network claim matters.

Given that there is no regulation of the terms of these customer connection contracts, EWON would support the introduction of unfair contract terms legislation to improve the protection afforded to consumers in NSW. We would hope that such legislation could act to encourage the development of minimum standards across NSW in relation to the assessment of claims.

The following case study is an example of how the application of the exclusion clause can be used by a supplier in a way that leads to the limitation of a consumer's rights:

GEORGE'S STORY

George contacted EWON in relation to a claim for compensation for damage to his dishwasher following an interruption to his electricity supply.

George's electricity supply had been interrupted for about four hours, and when power was restored, his dishwasher made a buzzing noise, and was later found to have malfunctioned. George had made a claim to the supplier for the \$1090 that it had cost to repair the dishwasher. The supplier rejected the claim on the basis that although there had been an interruption to George's electricity supply, the connection contract excluded any liability.

During EWON's investigation, the supplier advised that the cause of the interruption to George's supply in this case was damage to underground cables by a hole borer operated by a field operator employed by the supplier. Independent technical advice confirmed that the outage that followed the damaged was likely to have caused the damage to George's dishwasher. Even though their worker caused the outage, the supplier continued to deny the claim on contractual grounds.

EWON carefully considered the available information and determined that the supplier should pay George's claim, as the cause of the event, and the damage, were within the supplier's reasonable control.

If the terms of a customer's contract can substantially limit the right of a customer to recover compensation from a supplier for damaged property, they can have a detrimental impact on consumers. Complaints regarding damaged property are often highly technical,

complicated matters that are largely beyond the layperson's knowledge. Therefore, EWON would support moves to regulate and simplify the use of exclusion clauses in energy contracts.

Confused customers – insufficient disclosure of contract terms by energy and water suppliers in NSW

EWON's experience has been that a number of negotiated contracts offered to customers do not sufficiently disclose information to customers. This means that many customers are not sufficiently aware of the ramifications of signing a contract, in particular the penalties that may apply for cancellation. For instance, many of the negotiated contracts reviewed by EWON specify words to the effect of "if you terminate this contract before the end of its term, termination charges may apply". A significant number of the early contracts (and some of those currently being offered) did not contain any figures to indicate the extent or range of charges that 'may' apply. EWON investigated a number of complaints from customers who had in fact been charged for the 'remainder' of the contract (in effect a total of all charges, including an estimate of consumption). This appeared to be inappropriate activity by retailers on several grounds. The following case illustrates the difficulty for some consumers:

ALEX'S STORY

Alex rang on behalf of her aunt, who had been visited by a door-to-door marketer. Her aunt doesn't speak English very well so her young daughter translated into Greek. Unfortunately the daughter's Greek was not fluent and her aunt ended up signing a contract without realising this meant transferring her account to a new retailer.

Alex tried to cancel the contract but was told she would have to pay a termination fee. Alex was quite upset because she felt the marketer was taking advantage of people who did not speak English well, and did not explain the contract fully.

JILL'S STORY

Jill had signed a negotiated contract with Provider A about 3 years ago. When the contract approached its expiry date, Jill contacted Provider B to arrange a new contract. The transfer of Jill's account to Provider B occurred 2 months before the contract with Provider A was due to expire. Jill received a bill from Provider A including a termination fee of \$95.

Jill was very upset at this, as she was not aware that a termination would apply. She had reviewed the terms of

her contract, which stated that fees for early termination “*may*” apply. She felt that it was unfair for Provider A to charge such a fee when she was almost at the end of the contract.

EWON reviewed Jill’s contract and was unable to find any contractual breach by Provider A. However, EWON negotiated with Provider A to reduce the termination fee as a customer service gesture.

A number of customers have also complained to EWON that the terms and conditions of the negotiated contract are extremely detailed and difficult to understand, particularly for those not accustomed to reading or signing contracts. Some contracts contain deep within their text details about specific fees and charges (which do not apply to standard form contracts), reduced options for payment, and less inflated explanation of the bonus or incentive than appears in the advertising material. EWON’s experience is that few customers have read the contract in detail and fewer still are aware of the implications this may have for them. This is clearly a challenge that is currently facing the utilities: how to provide comprehensive information in a comprehensible and concise way.

This problem is particularly well highlighted in the format of the published contracts themselves. A number of customers have complained to EWON about the small, dense type/ font of the contracts. This has implications for the readability and comprehension of all consumers, but particularly for people with literacy difficulty or visual impairment. Other jurisdictions (such as Victoria) have regulated for a minimum font size for contracts and we would recommend similar provisions be adopted in NSW. Though this is not an issue involving unfair terms per se, if customers are to be bound to contract provisions it is reasonable to expect that they will have had every opportunity to make themselves reasonably aware of them.

In EWON’s experience, there are certain groups of consumers who are at a particular disadvantage in dealing with contracts. A significant proportion of complaints received by EWON in this regard have been from or on behalf of customers from non-English speaking backgrounds, customers with literacy issues, the elderly and frail, and people with an intellectual or physical disability. There is currently very limited regulation to protect these consumers. Therefore, we would support the introduction of unfair contract term legislation as an attempt to reduce the confusion faced by vulnerable consumers, and hence reduce the numbers of complaints received by suppliers and by EWON.

It is unlikely that the level of consumer awareness about the terms and conditions of energy contracts will increase in the short term. Thus, there will be cases where consumers are affected by contract terms unknown to them at the time of entering the contract. While EWON acknowledges that customers have responsibility for reviewing the terms and conditions of a contract before signing it, we would support the introduction of regulations to ensure consumers are protected from unfair contract terms.

Conclusion

Customer complaints to EWON indicate that the playing field on which consumers arrange for the supply of essential services is not a level one. The contracts that are used to create the supply relationship are drafted by the suppliers with very limited regulation of the actual terms of the contracts. The result of this is that consumers can be at a significant disadvantage. Energy and water supply are essential services that are required to maintain basic quality of life. While consumers now have the right to choose their energy retailer, each supplier uses similar contracts, and domestic and small business consumers rarely if ever have the power to negotiate the terms of their contract. The terms of the contracts used in NSW have rarely been examined in the courts, as most consumers do not possess the economic capacity to run such a case.

Based on the terms of the Victorian and United Kingdom legislation, we anticipate that the introduction of unfair contract terms legislation in NSW could require energy and water suppliers to review their contracts. We can see a number of potential benefits following this process.

- By leveling the playing field we would hope that essential services are kept within reach of vulnerable members of our community. The unfair contract terms legislation could operate as a catalyst for making the contractual relationship between energy and water consumers and suppliers fairer and more equitable. This would ensure that consumers are able to maintain their energy and water supply and meet basic standards of living.
- We would expect a decrease in the numbers of complaints received by suppliers and by EWON in relation to contract terms. This means reduced costs for suppliers, and increased satisfaction for consumers generally.
- With appropriate consumer protection, consumers would be in a better position to participate in the contestable energy (and possibly water) market. This is recognised as an important outcome in terms of efficiency of the energy and water markets.

We believe that significant improvements to the relationship between suppliers and consumers in the energy and water market could eventuate following the introduction of unfair contract term legislation. For this reason, EWON commends the NSW government for examining the issue of unfair contract terms legislation, and offers our support for the introduction of such legislation.

Attachment B

Australia & New Zealand Energy and Water Ombudsman Network (ANZEWON) to *The Productivity Commission Consumer Policy Framework Issues Paper* January 2007.



AUSTRALIA & NEW ZEALAND
ENERGY AND WATER
OMBUDSMAN NETWORK

17 May 2007

Consumer Policy Inquiry
Productivity Commission
PO Box 80
Belconnen ACT 2616

Email: consumer@pc.gov.au

Dear Commissioners

Thank you for the opportunity to provide a submission to the Productivity Commission's Inquiry into Australia's Consumer Policy Framework. This is a joint submission by the members of the Australia & New Zealand Energy and Water Ombudsman Network (ANZEWON). Our core business is resolving customer disputes about three of the most fundamental necessities of peoples' daily lives: access to electricity, gas and water. Therefore we consider we are well placed to bring to the Inquiry the perspective of these consumers and our observations about the energy and water supply industries.

We note from the Terms of Reference for the Inquiry that a key consideration is the need for consumer policy to be based on evidence from the operation of consumer products markets. The perspective we bring and the substance of our comments are grounded in our experience handling the complaints of Australian and New Zealand energy (and in some cases water) consumers over the past decade.⁸

ANZEWON and its individual ombudsman schemes are contributing to the review of legislation, codes and regulations affecting energy and water consumers, both at the national and state level. For instance, the major policy issue affecting energy consumers and the energy supply industry in Australia at the present time is the evolution of a

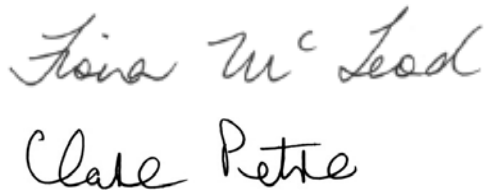
⁸ For example, EWOV has handled over 100,000 cases in ten years and EWON has handled over 55,000 cases in nine years.

national regulatory framework for electricity and gas supply, which will eventually replace the current jurisdictional regulatory arrangements. As part of this process, both the Energy & Water Ombudsman NSW (EWON) and the Energy and Water Ombudsman (Victoria) (EWOV) have made substantial submissions to each of the five working papers released by the Ministerial Council on Energy's Energy Retail Policy Working Group since late 2006.

This submission is organised around the questions which appear in the Issues Paper, although we have not commented on all the questions. We have addressed questions in the order in which they appear in the Issues Paper.

We hope that this submission assists the Commission with its Inquiry.

Yours sincerely

The image shows two handwritten signatures in cursive. The first signature is 'Fiona McLeod' and the second is 'Clare Petre'. Both are written in dark ink on a white background.

Fiona McLeod, *Energy and Water Ombudsman (Victoria)*
Clare Petre, *Energy & Water Ombudsman NSW*
Nick Hakof, *Energy Industry Ombudsman South Australia*
Judi Jones, *Electricity and Gas Complaints Commissioner New Zealand*
Simon Allston, *Energy Ombudsman Tasmania*



AUSTRALIA & NEW ZEALAND
ENERGY AND WATER
OMBUDSMAN NETWORK

Response to

The Productivity Commission

Consumer Policy Framework Issues Paper

January 2007

Submitted by the

Australia & New Zealand
Energy and Water Ombudsman Network

May 2007

Contents

<u>The rationale for consumer policy</u>	31
<u>Market trends and developments</u>	37
<u>How well is the current framework and suite of measures performing?</u>	43
<u>Policy tools – disadvantaged and vulnerable consumers</u>	51
<u>Generic v industry-specific regulation</u>	55
<u>Enforcement and redress issues</u>	58
<u>Self and non-regulatory approaches</u>	59
<u>Jurisdictional responsibilities</u>	61
<u>Regulatory and oversighting bodies</u>	62

The rationale for consumer policy

What are the key rationales for government intervention to empower and protect consumers? What should be the balance between seeking to ensure that consumers' decisions properly reflect their preferences (empowerment) and proscribing particular outcomes (protection)?

Governments tend to regulate to protect consumers when a product or service is particularly essential and when other forms of intervention will not achieve the same result. Energy and water are just such essential services. There is an unequal power relationship between energy and water consumers (whether individuals or small businesses) and the corporations that supply them with those utilities that cannot be left entirely to the market. Although it is suggested that the operation of a mature market will lead to the exclusion of exploitative or rogue traders, this is not always so. In any case it is neither fair nor reasonable if consumers have no redress in the meantime.

Further, some abuses are so egregious that it is unacceptable to allow the market merely to force out those unscrupulous providers (many of whom have no long term intent to be in the market anyway). This is not to say that government intervention must always be heavy-handed and prohibitive. It may be that a government intervention that gives more effective levers to the principled operators in an industry, that is to say, a co-regulatory approach, will be sufficient in some circumstances. For instance, the reporting regime which the NSW Independent Pricing and Regulatory Tribunal (IPART) requires of new electricity retail market entrants tends to be more onerous than retailers who have been operating for some time without major incident.⁹

In order to empower consumers to make informed decisions, it is sometimes necessary for government or regulators to conduct information or awareness campaigns around new policy initiatives such as the NSW Government's *Change or Stay – You'll be OK* campaign at the outset of full retail competition for electricity and gas supply in that state in January 2002. Not all consumers will absorb such information and may even fail to remember it when they actually encounter a situation where the information might have been useful (such as when they are door-knocked by an energy marketer). However, the value of such education campaigns can never be underestimated. It is equally important for government and regulators to provide consumers with the practical tools to enable them to make informed decisions. For instance, the Essential Services Commissions of both Victoria and South Australia offer consumers on-line 'energy comparator' tools which compare the energy contract offers of all licensed retailers in those states. Programs and tools such as these should accompany any new policy direction, market practice, or industry change that has the potential to significantly impact the average consumer.

⁹ *Electricity Retail Supplier Reporting Manual*, Independent Pricing and Regulatory Tribunal of New South Wales, p4-5

The rollout of advanced metering (ie. metering which enables retailers to charge customers different tariffs for different time bands) is one area of electricity distributors' operations that has a significant impact on consumers but which until recently has occurred in the absence of any clear national policy. Such metering has the potential to offer consumers considerable benefits if managed properly. For instance, if consumers are able to access easily-understood information via in-house displays that provide real-time information about the cost of electricity, and they are adequately educated and consulted about the technology by their electricity distributor or retailer, this can not only reduce consumers' ongoing costs, but can contribute to the reduction in peak demand for electricity.

However, if distributors undertake the rollout of advanced metering in an ad hoc fashion or in the absence of clear and consistent policy, as some already have, there is a real risk that consumers may be burdened with obsolete technology that they are unable to use to alter their electricity consumption behaviour. EWON and EWOV have already seen a growing number of consumer complaints over the past two years about problems that have arisen due to consumers not being adequately informed about the impact that an advanced meter will have on their current usage patterns or their contractual relationship with their electricity retailer. The Ministerial Council on Energy (MCE) has begun to establish a national policy framework for the rollout of advanced metering (which also has the potential to be used for natural gas and water supply).¹⁰ ANZEWON is supportive of the MCE's moves in this direction, as this is a good example of government intervening not only to bring some consistency to an industry development, but also to empower and protect consumers.

A key theme of this submission is that at a macro level neither consumer protection nor consumer advocacy is adequately resourced or positioned in Australia so that it is difficult to be definitive about what should be the balance. Ideally, they ought to be separate functions if they are each to be effective. ANZEWON members are of the view that there are benefits in having both robust consumer protection and a national consumer advocacy body, as the former prevents, minimises and remedies maladministration and service failures, while the latter can cast a public spotlight on systemic failures and the need for regulatory reform. Clearly each is needed.

Under what conditions are markets most likely to develop responses to the various impediments to the effective participation of consumers? To what extent will the actions of well-informed consumers drive outcomes across markets as a whole?

In general, regulation — or the threat of regulatory intervention — has been effective in developing responses to the various impediments to the effective participation of consumers. Sometimes it has been straight regulation, other times it may be co-regulation or a regulatory underlay to a self-regulatory initiative. ANZEWON members believe, on the basis of having observed customer issues arise in the energy industry and the

¹⁰ [*Smart meters: information paper on the development of an implementation plan for the roll-out of smart meters*](#), Ministerial Council on Energy, January 2007.

responses to those issues, that if there is no possibility of imposed regulation, there can be a lack of incentive to deal with impediments to effective consumer participation. Individual companies may move in advance of regulation, but a whole industry sector will generally not move to improve the situation for consumers in advance of at least a threat of regulation, if not regulation itself. Appropriate regulation provides the foundation.

Hardship Programs

A very significant development in the energy industry over recent years has been the development of programs and policies to deal more effectively with consumers who are experiencing financial hardship. Traditionally, energy suppliers (and in particular electricity suppliers) relied on blunt instruments such as disconnection or the threat of disconnection, to induce customer payment. Such policies failed to recognise the need for companies to assist customers in managing their energy usage and the costs of that usage, and were devastating to the individual consumers disconnected from supply. During the late 1990s and early 2000s those retailers that had set up customer hardship programs earned the loyalty and appreciation of customers who needed additional time to pay, and/or advice on how to reduce their household energy use. ANZEWON ombudsmen began a dialogue with energy retailers in light of their observations of these successful provider programs, and pointed to the potential costs to companies of not having adequately resourced hardship programs in place. This has seen many of the larger providers moving in advance of regulation to set up customer hardship programs that have had good results for those consumers seeking flexible payment options.

These companies accept payments at levels which may not be high enough to clear debts in the short term, but which avoid the consumer having their supply disconnected. In some cases the companies offer incentives and debt waivers to encourage regular payment. The companies save on debt collection costs and ensure they have some payments from those customers where otherwise there might have been none. For those consumers receiving a Centrelink benefit, being able to pay their energy bills by way of regular deductions from their benefit (Centrepay) is an effective method of remaining connected to supply and out of debt with their energy retailer. ANZEWON is pleased to note that many retailers have adopted the Centrepay option for those customers who would otherwise be facing hardship in meeting their energy usage costs.

There have been some jurisdictional differences in the approach of retailers to hardship programs. Some companies in Victoria, for example, were resistant to developing their own programs even where many other retailers in the State had done so. A Victorian Parliamentary Inquiry into the Financial Hardship of Energy Consumers, which reported in 2006, found much evidence of the severe effects of disconnection, particularly on vulnerable and low-income customers. This led to the introduction of legislation requiring all energy retailers in that State to have hardship policies and programs. The second tier retailers have recently submitted their policies to the Victorian Essential

Services Commission for approval.¹¹ The outcomes of this government intervention are yet to be evident, but ANZEWON supports such regulation where calls for self-regulation have failed to result in consistent basic levels of service for consumers in areas such as customer hardship management.

To date, New South Wales has not followed a regulatory path though this is possible at some point. The larger energy retailers in New South Wales have developed hardship programs in a self-regulatory way. This process has been aided by the active interest of the regulator, who has indicated to retailers that they will intervene if self-regulation does not result in all NSW retailers developing their own hardship programs.

What are the important costs of intervention? How significant are the hidden costs of intervention? How do these compare to the costs of not intervening?

The following example of regulatory intervention in Victoria acknowledges the adverse impacts of disconnections and ensures compensation for consumers who are disconnected from their energy supply unreasonably or in error. The *Wrongful Disconnection Payment* legislative amendments came into effect on 8 December 2004. They resulted in an immediate and significant decrease in disconnections.¹² Wrongful Disconnection Payments (\$250 a day or pro rata for each additional day a customer remains disconnected) are only payable where an energy retailer has breached the terms of its contract with their customer. These terms include minimum service standards outlined in the Victorian Essential Services Commission's (VESC's) *Energy Retail Code*. It is clearly arguable that there should have been no extra compliance costs in complying with something that was already a requirement. If there were, it could be suggested that the providers' compliance systems were previously inadequate. In terms of the payments themselves, these are small compared to the turnover of the businesses. The VESC calculates that \$132,079.97 was paid in Wrongful Disconnection Payments in 2005-06 across all retailers.¹³

In Queensland the *Electricity Industry Code* provides for a one-off payment of \$100 for a wrongful disconnection and in WA the *Code of Conduct for the Supply of Electricity to Small Use Customers* which commenced operation on 31 December 2004 provides that the retailer must pay the eligible customer \$50 for each day that the eligible customer was wrongfully disconnected, up to a maximum of \$250.

¹¹ [Energy Retailers' Financial Hardship Policies, Draft Decision, March 2007](#), Essential Services Commission (of Victoria).

¹² EWOV cases involving disconnections reduced significantly in the six months from January – June 2005 compared with the preceding six months. For example, electricity disconnection billing cases went from 850 in July – December 2004 to 382 from January – June 2005. Gas billing disconnection cases went from 437 to 187 over the same period. (*Resolution 20*, page 13).

¹³ *2005-06 Compliance Report for Victorian Energy Retail Businesses* (February 2007) p19

Disconnections are costly for retailers, involving visits to customers' homes, additional calls to and from their call centres, the administrative costs of reminder and warning notices, field visits to disconnect and reconnect. However, the costs are far higher for customers who are disconnected, and can include not only food spoilage and the costs of alternative accommodation, but social, health and psychological costs.

The VESC report cited above notes:

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

The key reasons for the complaints to EWON were retailer failure to use best endeavours to contact customers or to advise customers of the availability of financial counselling, concessions and the Utility Relief Grant Scheme and inadequate assessment of the customer's capacity to pay.¹⁴

In New South Wales, the regime of operating licences overseen by IPART imposes some compliance costs on those energy and water suppliers licensed by the Tribunal, mainly in the form of the preparation of annual compliance reports. To date IPART has not had to revoke an operator's licence, but in mid 2006 IPART took the step of making an enforceable undertaking against one energy retailer as a result of a number of licence breaches that had received significant negative media coverage and resulted in an upsurge of complaints brought to EWON.¹⁵ The cost of such regulatory intervention should be viewed as insignificant when compared to the potential costs to consumers and the industry of allowing a retailer to continue operating in an unacceptable way, or in relying on enforcement of a civil penalty through the courts.

There is regulation in most jurisdictions to require energy companies to provide accounts to customers at regular intervals based on actual consumption data. This means that retailers must ensure customer meters are read, or that they must attempt to contact customers where access to the meter has not been possible (eg locked gate). There are costs for retailers in being required to deliver regular and accurate customer accounts. However, there can be greater costs to consumers where this requirement does not exist. Consumers often only become aware of a problem with their energy or water service through their bill. For example, they might have a hidden water or gas leak, or might not realise the amount of electricity that a newly installed appliance consumes. If they do not receive a regular and accurate account they will not be aware of the problem and therefore will not have the opportunity to mitigate the problem. Failure to address internal

¹⁴ Ibid, p19-20.

¹⁵ Independent Pricing and Regulatory Tribunal of New South Wales, [Energy distribution and retail licences compliance report for 2005/06: Report to the Minister for Energy](#), p37.

problems with energy or water supply can cost domestic and small business customers large amounts of money.

In summary, it is clear that in the area of essential service provision, overt regulation or the threat of regulation has often been required to ensure that the power asymmetries that exist between individual consumers and their providers are adequately (re)balanced. It has been interesting to see how, once such regulatory or co-regulatory mechanisms are put in place, consumers are often more able to participate equally in the market, manage their affairs, and better afford to maintain what are non-discretionary services.

Market trends and developments

How have recent market trends changed the requirements for Australia's consumer policy framework? For example, has the growth in e-commerce made it more difficult to enforce regulation, thereby reducing its effectiveness? Or has the Internet empowered a greater proportion of consumers? Has greater product complexity made it more difficult for consumers to participate effectively in markets? What are the impacts of the greater use of product bundling and standard form contracts? What other new developments are likely to have material implications for the policy framework over the next decade?

Internet and E-Commerce

The Internet and email have arguably had a lesser impact on energy and water consumers than those consumers in other industries where goods are regularly traded electronically. Consumers can, however, do such things as open or close a standard energy account, read the policies of a retailer, and lodge an enquiry or complaint via the websites operated by energy retailers.

Product Complexity and Product Bundling

Product complexity, on the other hand, has grown exponentially in very recent years in the provision of electricity and gas. Far from receiving a once- straightforward power bill, customers are now required to navigate a complex terrain of retail and distribution services and requirements. Rather than a flat rate, customers will typically be charged on highly complex tariffs, stepped according to usage and time band. Charges will be separated between network and retail components, fixed and variable components (to say nothing of miscellaneous fees). With an emphasis on sustainability, customers are now being required to interpret billing and metering data and develop the skills to shift usage from peak periods.

Even greater product complexity has faced customers where retail energy markets are competitive (South Australia, New South Wales, Victoria, the Australian Capital Territory and soon Queensland). In these States and Territories, customers have very rapidly been encouraged to reconfigure their thinking about essential services such as electricity and gas (and soon for water in Sydney and the Hunter Valley) in terms of *contestability*. Consumers are receiving door to door marketing visits and telemarketing calls, they are being signed to complex, binding retail contracts, and they have to make pricing comparisons across retail offers that can be both time consuming and complicated.. Customers are being offered other 'bundled' products in addition to their electricity or gas service, e.g. air conditioner, heater, internet service.

It is clear to ANZEWON that the degree of sophistication being required of customers has grown considerably in the last few years. It is also clear that a number of consumers, particularly those with accessibility issues (e.g. customers from diverse cultural and/or

linguistic backgrounds, the frail aged, customers with disabilities) are in some instances being left behind.

Unpublished consumer research undertaken by the Victorian Essential Services Commission in conjunction with its work on Energy Choice showed that information was a barrier for those customers who were not making active choices. The research also showed that 50% of those surveyed were unable to name a retailer other than their own.¹⁶ It also showed that lower income and more vulnerable customers were not benefiting from the greater product differentiation in the market. ANZEWON believes that there is a clear need for consumer protection as this trend gains pace, and especially where essential services are bundled with non-essential services. Even where electricity and gas are bundled together, the stakes for consumers become higher as they are potentially at risk of disconnection from two essential services.

Product complexity and differentiation clearly benefits more informed and confident consumers, but leaves behind those consumers whose personal circumstances make them less able to participate in a dynamic and highly competitive market. This creates a regulatory challenge: how to protect those consumers without limiting the benefits of differentiation to those consumers able to participate effectively.

Standard Form Contracts

Standard form contracts are also a potential source of consumer detriment. In the electricity market, there are standard form (deemed) contracts which cover the relationship between distributors, retailers and end-use customers of which most consumers would not even be aware.

In New South Wales, standard form customer connection and supply contracts are written and published by the local distribution and retail suppliers themselves, and often contain waivers of liability for all manner of events. The contracts must include regulated minimum provisions, but distribution and retail suppliers have a free hand to add any other terms and conditions as they see fit. While it is clear that a number of network events (particularly those relating to extreme weather) are beyond the control of the distributor, a number of the waivers contain elements that many consumers may be surprised to read, and that potentially blur the relationship between retailer and distributor. The following extract is an example of some of the restrictions included in a New South Wales customer connection contract (emphasis added):

[Retailer A] Standard Form Customer Connection Contract (Feb 05)

16.3 Exclusion of liability for supply interruptions, distortions or fluctuation

Subject to the above, and as far as the law permits [Retailer A] is not liable for any loss the customer may suffer (including, without limitation, where caused by any negligent or wilful act or omission by [Retailer A]) arising from

¹⁶ Research presented to a stakeholder forum at the VESC, 23 March 2006.

- a) any fluctuation or distortion (in voltage magnitude, voltage waveform or frequency) or interruption to the supply (by the customer's retail supplier) of electricity to the customer's premises or from any such supply not being or remaining continuous;
- b) the customer's retail supplier discontinuing supply of electricity to the customer; or c) [Retailer A] interrupting the supply of electricity by the customer's retail supplier to the customer's premises.

16.4 To the extent that [Retailer A] has any liability to the customer despite the effect of paragraph 16.3, [Retailer A]'s liability (under contract, tort or any other basis), is limited, as far as the law permits, as follows:

- a) [Retailer A] is not liable for any indirect, economic, special or consequential losses of any kind suffered by the customer (including corruption of data losses, business interruption losses, loss of profits or any other indirect costs of any kind), and
- b) [Retailer A]'s liability for all other losses suffered by the customer is limited to the lesser of:
 - i. **The total amount billed to the customer's retail supplier** (or to the customer under clause 7.4) **for network charges** relating to the use of [Retailer A]'s distribution system for the supply of electricity by the customer's retail supplier to the customer's premises) **during the year that [Retailer A]'s breach, act or omission (which gives rise to the claim) occurred, or**
 - ii. \$5,000 (GST inclusive, if any), for all claims the customer makes in any one calendar year.

Such exclusion clauses are frequently relied on by distributors to deny claims submitted by customers for compensation for damaged appliances. The denial of the claim can have a significant effect on customers, and the operation of the exclusion clause certainly attempts to limit "the consumer's right to sue the supplier".

In Victoria, on the other hand, there are two regulatory or legislative initiatives which prevent this kind of unfairness. Firstly, there are the guidelines on *Voltage Variation Compensation* which require distributors to give access to compensation to any small retail customer who has experienced property damage as a result of unauthorised voltage variation affecting their electrical installation.¹⁷ The contrast with New South Wales is striking, where there is no regulated requirement for electricity distributors to respond positively to customer claims for such property damage. Since 1998, EWON has made 58 Determinations under clause 6.1 of its *Constitution*. Of these, 57 have related to distributor claim matters. Binding decisions are a last resort for ANZEWON member schemes and take a large toll on the resources of the scheme as well as of the companies involved. In Victoria, the Ombudsman has made no binding decisions relating to distribution claims since the *Voltage Variation Compensation* guidelines were introduced. This is a clear example of a regulatory initiative lowering costs that might otherwise be incurred. We would argue that even the costs to providers are lowered by these clear guidelines because they do not have to put resources into

¹⁷ Office of the Regulator-General Victoria, [Electricity Guideline No 11: Voltage Variation Compensation, Version 1, April 2001](#).

arguing every case from first principles, nor do they incur complaint fees from the jurisdictional ombudsman.

The second Victorian initiative was the unfair contract terms provisions introduced into the *Fair Trading Act 1999* (Victoria). Consumer Affairs Victoria (CAV) commented on these provisions in its 2005-06 Annual Report:

Markets work most effectively where consumers are able to exercise genuine choice. The emergence of standard form contracts in our modern economy limits consumers' ability to exercise choice. It is not uncommon to find entire industries that have highly similar consumer contracts. This limits consumers' options in choosing a supplier with a 'fairer' contract – consumers often have to accept contract terms on offer, or not purchase the particular good or service.

In recent years, many consumer contracts have become biased towards the supplier. This, combined with the prevalence of standard form contracts, means that consumers often find themselves in contracts where they have few rights but many obligations. The unfair contract terms provisions introduced into the Fair Trading Act 1999 aim to redress this imbalance. The provisions seek to ensure that contractual rights and obligations are fairly distributed between parties to a contract.

Some other jurisdictions are examining similar provisions. In late 2006, EWON contributed a submission to the New South Wales Legislative Council Standing Committee on Law and Justice's *Inquiry Into Unfair Terms in Consumer Contracts* in which it supported the adoption of legislation in New South Wales similar to that now present in Victoria and the United Kingdom.¹⁸ EWON noted in their submission that:

While consumers now have the ability to choose their energy retailer, each supplier uses similar contracts, and domestic and small business consumers rarely if ever have the power to negotiate the terms of their contract. The terms of the contracts used in NSW have rarely been examined in the courts, as most consumers do not have the economic capacity to run such a case.

ANZEWON would like to see unfair contract terms provisions introduced on a national basis. At present, contract terms that are arguably unfair are contained in energy market contracts in at least the following ways:

1. *Disconnection of supply*

One of the key enforcement mechanisms granted to suppliers under the terms of energy and water contracts is the ability to disconnect or restrict supply. As energy and water are “essential services”, suppliers hold a powerful tool - the ability to take away the service – for persuading consumers to do, or refrain from doing, a particular action. The following

¹⁸ [Submission by the Energy & Water Ombudsman NSW to the New South Wales Legislative Council Standing Committee on Law and Justice: Inquiry Into Unfair Terms in Consumer Contracts, October 2006.](#)

list outlines some examples of the events which enable a New South Wales supplier to disconnect a consumer under the terms of its regulated standard form customer supply contract:

Supplier A Standard Form Customer Connection Contract (October 2002)

We may arrange to disconnect your property if:

- you do not pay on time any amount due to us under this contract for the supply of electricity or connection services arranged by us*
- you do not provide the security that we require*
- you otherwise fail to comply with the terms of this contract*
- a receiver, administrator or liquidator is appointed for any of your assets*
- you refuse or fail to give an authorised person access to your property in accordance with any rights of access provided for in the Electricity Supply Act*
- you obstruct an authorised person in relation to anything in connection with this contract*
- you assign your rights under this contract without first obtaining our consent (which may be given or withheld at our discretion) or you vacate your property.*

Aside from the consequential costs to customers of the disconnection, suppliers are also able to charge customers disconnection/reconnection fees to recover costs of carrying out the disconnection. These fees, regulated by New South Wales' Independent Pricing and Regulatory Tribunal, tend to range between \$50 and \$100, and are often a prerequisite for reconnection of supply.

Where disconnections are due to non-payment of bills, the disconnection is unlikely to improve a consumer's ability to pay their bills on time, rather it is likely to lead to essential services being out of reach for many consumers, particularly if administrative charges (eg late fees, disconnection fees) are added to the consumption and service charges. This affects many, mostly low-income, consumers. The most recent publicly available data for New South Wales suggests that 24,056 customers were disconnected for non-payment of electricity arrears in 2005-06.

Importantly, there appears to be no guaranteed compensation (at least equivalent to the regulated disconnection fee) should the retailer or distributor disconnect the customer in error or without due regard to compliance requirements. It is arguable, then, that the contract creates a one-sided advantage for the supplier while providing little redress for a customer.

2. Contract termination fees

Many (although not all) energy retailers include a provision in their negotiated supply contract terms that allows them to charge the customer a fee if the customer cancels or terminates the contract before the end of the contract period. For a small retail customer, these fees can be up to \$125 GST exclusive for each fuel type (ie electricity and gas are

separate fuels under such contracts).¹⁹ ANZEWON is not aware of any suppliers that include a provision in their negotiated supply contracts which requires the supplier to pay the customer any form of early termination fee in the event of the supplier cancelling or terminating the contract early (such as when a meter installed by the customer's network provider makes it impossible for the customer's retailer to continue billing the customer under a flat tariff). This illustrates the power imbalance that can occur with the inclusion of termination fees in contract provisions.

Although many suppliers argue that termination fees are an attempt to recover the reasonable costs of losing the customer, such fees can be a significant proportion of a customer's final bill. A 2006 review by the Victorian Essential Services Commission indicated that in many cases the quantum of the termination fee was well above the actual costs incurred by the supplier involved, and in some cases the supplier actually made a significant profit on the termination fees²⁰. As a result of the VESC's review, retailers operating in Victoria will face limits on the level of early termination fees that they can charge consumers from 1 May 2007.

¹⁹ It is worth noting that at the commencement of energy competition in the small retail market in NSW, EWON received many complaints from customers of one retailer that termination fees were in the hundreds or even thousands of dollars.

²⁰ Essential Services Commission, [Early Termination Fees Compliance Review: Issues Paper, July 2005](#); [Preliminary Findings, March 2006](#); and [Draft Decision, July 2006](#).

How well is the current framework and suite of measures performing?

Is the current consumer framework fundamentally sound? Does it simply require fine-tuning or are more comprehensive changes required? What measures could be used to assess whether it is delivering for consumers?

ANZEWON believes that more than fine-tuning is needed to achieve a fundamentally sound and nationally consistent consumer policy framework in Australia. In particular, consumer advocacy (empowerment) is under-resourced and under-developed. It is essential for good outcomes in regulatory developments that a strong, informed and representative consumer voice is available for submissions and consultations. Industry generally has the resources to respond. Consumer groups, even where they exist in specialist areas, generally do not. Policy and regulation can suffer as a result. In addition, short time frames to respond to very complex issues can create barriers to responses by consumer representatives because of their limited resources.

Ombudsmen have played a positive role in offering evidence-based and independently researched submissions which draw upon the direct experience of consumers through the cases and complaints that come to ANZEWON members. To complement the independent work of ANZEWON, effective consumer advocacy and research is also required.

In terms of dispute resolution for consumers ANZEWON is confident that its member schemes offer energy and water consumers a fair, free, accessible and independent service. One measure of our success may be the nature of complaints coming to our offices. The reduction in less complex complaints that has occurred as our schemes have evolved indicates that providers are dealing appropriately and productively with these cases themselves. The increase in the number of complex cases handled by our schemes indicates that consumers need and value independent analysis of their complaints in an increasingly complex industry and consumer environment.

Does the current framework focus on the right issues and areas? Are there significant gaps or imbalances in coverage, or particular objectives that are not well catered for? Is there any significant duplication of policy effort?

Sustainability

ANZEWON is a stakeholder in the service delivery of industries that are facing extreme challenges of sustainability and adaptation to changed circumstances: energy and water. We have seen the inter-relationship of these challenges as water shortages have led to reduced power generation in Queensland and the lack of availability of hydro power (due to water shortages) in Victoria and New South Wales which have led to increased

reliance on more polluting forms of energy. Because of this, ANZEWON believes that sustainability needs to be an objective within the consumer policy framework.

Prices for consumers are increasing or scheduled to increase as a result of measures to be undertaken at a macro scale to improve sustainability, such as the recent draft IPART decision on electricity prices or the introduction of state-based renewable energy target schemes²¹. Consumer groups are raising warnings about the inequitable impact this could have on poorer groups within society.²² Nationally, consumers are being urged to conserve water and, at least in some jurisdictions, power.

Sustainability will increase in importance as a goal at all levels of society, from households, through business, to state and national levels. It needs to be an objective of consumer policy as well, because consumer policy needs to take account of how it can be pursued without falling inequitably on some sections of society. Consistency across jurisdictions in the level of funding and types of programs offered to consumers to assist them in conserving water and reducing their energy use is vital as part of this process.

Marketing

A current gap in coverage relates to marketing. Marketing in the energy industry is very active.²³ South Australia, Queensland, New South Wales and Victoria each have a Code of Conduct for energy marketing. The Codes vary slightly between jurisdictions, which has led to the problem of some retailers relying on the wrong Code provisions when marketing to consumers in another state. Energy companies operate across state borders and it would be a benefit to have a single national code that is either specific to energy marketing or which adequately addresses the unique requirements for marketing essential services such as electricity and gas. ANZEWON members will continue to make this point in future submissions to the Ministerial Council on Energy's consultation process over national regulation.

ANZEWON acknowledges that at the macro level marketing appears to be operating effectively. Given the amount of door-knocking and cold-calling in the jurisdictions with full retail competition, the numbers of marketing complaints our schemes receive are a relatively small percentage (though it is important to note that in South Australia and New South Wales the percentage is growing rapidly).²⁴ We also note that retailers often respond promptly and positively when we bring our concerns to their notice, as the

²¹ <http://www.theage.com.au/news/national/power-and-water-bills-set-to-soar/2007/04/11/1175971180073.html>

²² <http://www.theage.com.au/news/national/fear-higher-water-bills-could-hit-poor/2007/04/01/1175366078737.html>

²³ In 2005-06 EWON saw a 254% increase in the number of complaints regarding energy marketing. (EWON *Annual Report 2005-2006*, p. 18) The Energy Industry Ombudsman South Australia (EIOSA) reported that for the 2005-06 year 23.87% of its cases related to competition, the largest category after billing. (EIOSA *Annual Report 2005-2006*, p. 18) In Victoria EWON cases relating to retail competition went up by 73% in 2004-05 and continued at that level for 2005-06 (EWON *2005 Annual Report*, p 34 and *2006 Annual Report*, p.19)

²⁴ EWON calculates that it receives about 1 complaint for every 200 customers who switch provider.

following case study from EIOSA illustrates. Nevertheless, it is important that the significance of the marketing cases received is not underestimated, as they are key indicators of issues in the marketing of energy. The energy market is an immature one and, given that it is based exclusively on customer switching (rather than creating *new* consumers for the product), it is open to misleading and deceptive conduct. In all jurisdictions we have found cases where the marketing has been to customers who were clearly not competent to consent, for example, by virtue of dementia or other health issues, or not being able to speak or fully understand English. We have also found cases in which misleading representations were made, including the frequently reported ‘We’re from the government’ or ‘We’re taking over the supply of electricity in your area’. The EIOSA case is typical of many we have encountered:

Ms S contacted EIOSA to register her concern after she received a visit from a sales person representing an electricity retailer who had asked her to sign an “expression of interest”. When Ms S asked if the document was a contract, the sales representative emphasized that it was an “expression of interest” only, not a contract. However, on looking through the document Ms S could clearly see that it was a contract as it included details about the cooling-off period. However, the representative continued to argue that it was not a contract and Ms S terminated the contact.

Although Ms S contacted EIOSA she did not want any further dealings with that retailer but agreed to send the document to this office. On examination it was clear that the document was a contract. Because of a concern that this sales approach could be a systemic issue EIOSA raised the matter with the retailer without identifying the customer.

The retailer gave this marketing complaint its highest complaint rating which includes the action of removing a sales representative from the field until the completion of an investigation and potentially requiring re-training before the representative is sent back to the field.

On the completion of the investigation the retailer advised EIOSA that they no longer contracted the sales representative. The retailer also gave an assurance that the terminology “expression of interest” is not included in their marketing training program. A meeting of sales representative active in South Australia was held by the retailer to reinforce this point.

EIOSA was satisfied with the response and actions of the retailer.²⁵

A national Marketing Code of Conduct (whether generic or energy-specific) should cover the following minimum requirements:

- full product disclosure
- common marketing hours
- proper identification of the marketer and who they represent

²⁵ EIOSA *Annual Report 2005-2006* p. 36

- how a marketer should respond if a customer does not wish to proceed (eg. cease marketing immediately)
- the operation of a no-contact register
- full disclosure of contract terms, including termination fees and cooling-off periods
- the need for informed consent, and
- a prohibition on false and misleading representations.

There are provisions contained in the existing jurisdictional Marketing Codes of Conduct which indicate that energy marketing may require specific considerations that would not be relevant to a generic Code, such as:

- ensuring the customer is aware of their right to an applicable standard form contract and how the terms of such a contract may differ from that being offered by the marketer
- the expected date of commencement of the contract (which might be up to 90 days after the date of signing).

Has the inclusion of new objectives, such as strengthening the position of small businesses in their dealings with larger enterprises, impacted on the effectiveness of the framework? Should consumer policy be further extended to cover small businesses as consumers?

ANZEWON members believe that small businesses should be protected within the consumer policy framework. It is our experience that the owner/operators of many small businesses possess no greater market knowledge or resources than residential consumers when it comes to their dealings with energy and water providers, and may in fact be at greater risk because of a tendency to assume that they will receive advice from a retailer that is tailored to their specific circumstances. It should be noted that small businesses can be operated by people who are themselves vulnerable. The following case study from EWON illustrates this.

Maria runs a small wholesaling food business so, even though hers is a very small enterprise, it uses a lot of electricity because of industrial refrigerators and cooling rooms. Recently she received a letter from her provider advising her that she was required to be supplied electricity under a market contract rather than the standard form regulated contract. Maria asked the provider why they had not automatically offered her this contract when she opened her account, but did not receive a response. Maria then received a letter advising that unless she signed a contract, she would be charged "mandated" rates, which were significantly higher than the rates she had been paying. Because she had not yet received a response to her query, Maria did not sign a contract. In response, her provider then issued her a bill on the "mandated rates". Maria contacted the provider to dispute this invoice and was advised that because she had not paid the bill by the due date she would have to pay a \$3000 security deposit in addition to the \$2600 "mandated rates" invoice. She was told that if she did not pay these amounts within one week, her premises would be

disconnected. Maria was very upset at this request, as electricity supply was vital for powering her freezers. She managed to pay the amounts under protest, and contacted EWON about the provider's actions. She felt that she shouldn't have to pay the higher "mandated rates" which weren't listed anywhere on the contracts she'd seen, and that she shouldn't have to pay a security deposit in these circumstances.

It is worth noting that most Australian jurisdictional energy legislation defines customers not as residential or business but as small and large retail customers – with the demarcation being set by energy consumption level. (This level varies considerably across states and territories but the most common level for electricity, for instance, is 160 Megawatt hours per year, equivalent to about \$20,000). ANZEWON's experience suggests that while energy consumption can be – and currently is – used as a means of establishing the protections to be made available to a consumer, the equation is not an exact one. It is clear that some of those who contact our schemes would not be considered large businesses under standard definitions²⁶ but are simply small enterprises with large energy demands (small food handling businesses that use freezers or small workshops with high energy use tools or equipment). Customers in these circumstances, who might otherwise be small owner-run businesses, are not infrequently in positions of significant disadvantage where their level of consumption has disallowed them access to the benefit of consumer protection regulation currently available to those whose consumption falls below the relevant threshold. For this reason ANZEWON considers that consideration should be given to customers with particular vulnerabilities – such as the small businesses listed above or small business owners with language or other difficulties – particularly in terms of access to fundamental protections, notably external dispute resolution and payment/instalment plan options.

Is the balance of responsibility between governments, business and consumers broadly appropriate? Does the framework pay sufficient regard to the costs of intervention for consumers and businesses? Does it promote certainty and clarity for consumers and businesses and is it sufficiently evidence-based? How well has it coped with the changing circumstances identified earlier?

It is difficult to comment on the balance of responsibility between governments, business and consumers in the energy sector because of the variation between states, but ANZEWON makes the following observations:

- Consumer organisations are not adequately resourced to effectively participate in the consumer policy framework. In New South Wales, the Utility Consumers' Advocacy Program (UCAP) operates from the Public Interest Advocacy Centre, and receives its funding from the NSW Government. UCAP regularly raises utility issues it sees as being in the public interest, or on behalf of vulnerable

²⁶ There are several means to define a business as small or large, e.g. through annual turnover (see s6D of the *Privacy Act 1988* [Cth]) or staff size (the Australian Bureau of Statistics recommends a small business to be one that employs fewer than 20 people: see [Small Business in Australia, 2001](#)). The latter appears to be the definition currently most favoured legislatively.

consumers.²⁷ Victoria has a similar program, the Consumer Utilities Advocacy Centre (CUAC).²⁸ Organisations such as CUAC and UCAP are advocates for energy consumers at a jurisdictional level but there are few if any equivalents at a national level.

- There have been some effective enforcement interventions by Consumer Affairs Victoria (CAV) and IPART in New South Wales²⁹. In two cases in Victoria and one in New South Wales, providers have entered into enforceable undertakings or agreements with either CAV or IPART as a result of marketing which was non-compliant with licence conditions or led to consumer detriment. ANZEWON sees such enforceable undertakings and agreements as appropriate and effective measures to redress consumer detriment.
- ANZEWON would cite its own member ombudsman schemes as instances where the balance between governments, business and consumers is appropriate. Governments are involved by making membership of an approved dispute resolution scheme a requirement. Providers set up the schemes (with the exception of the statutory scheme in Tasmania) and have ongoing participation in their management and operation through membership of their respective boards. Consumers or consumer representatives also have a role in the management of the schemes, either by equal membership of the board (Victoria and South Australia) or through membership of a Council (New South Wales). The independence of the schemes ensures that complaints are handled in an impartial way – the ombudsman is not an advocate for either the consumer or the provider. Industry has been willing to pay for the operation of the schemes because they recognise the need for independent external dispute resolution for their customers, the efficient handling of complaints they have not been able to resolve themselves, and because of the continual improvement to their internal systems that the ombudsman schemes foster. An example of this support from industry (and other stakeholders) can be seen in independent and external stakeholder surveys undertaken by some of the ombudsman offices:

EIOSA:

The findings that emerge from the stakeholder interviews were exceptionally positive in their direction, with changes sought representing minor modifications rather than any substantial restructuring of the scheme. Where responses were given in the form of five point rating scales, the majority were 4.0 or greater and there were only two under this point (3.9 and 3.75)...³⁰

²⁷ <http://www.piac.asn.au/system/ucap.html>

²⁸ <http://www.cuac.org.au/index.php>

²⁹ In Victoria TXU and Energy Australia both entered into enforceable undertakings. There is an account of the Energy Australia enforceable undertaking in the Consumer Affairs Victoria 2005 Annual Report at p.11. In NSW Jackgreen entered into an enforceable undertaking with IPART in June 2006.

³⁰ EIOSA Annual Report 2005-06 p 20.

EWON:

There is widespread agreement that EWON has performed very well and to an extremely high standard in its first three years of operation. Indeed, as an evaluator, it is rare to come across such a high degree of consensus in a performance review of this kind. The positive regard in which EWON is held by the majority of scheme members, consumer and community representatives, industry and government stakeholders and customers is a major achievement given the nature of the scheme and the short time it has been in operation.³¹

EWOV:

The feedback from stakeholders indicates that EWOV is well regarded by stakeholders in terms of:

- *overall performance*
- *quality and efficiency of staff and operations*
- *outcomes—as the majority of complaints are judged to be resolved in an acceptable manner*
- *raising community awareness*
- *the relationships which it maintains with stakeholders...³²*

What broad changes to the framework could be made to deliver greater benefits or more cost effective outcomes for the community? In this regard, what can Australia learn from the experience of other countries?

As previously mentioned, ANZEWON believes that the framework needs the following broad changes:

- more adequate resourcing of consumer advocacy, particularly at a national level
- national regulation of energy and water consumer protection - wherever possible to be achieved through generic regulation - but by way of energy or water specific regulation where generic protection is not possible or adequate.

We note a positive model for achieving many consumer policy aims is that of the Committee for Melbourne.³³ The Committee for Melbourne's model for achieving its strategic objectives is a tripartite one: it harnesses the knowledge, resources, experience and ideas of government, business and civil society to work together on intractable problems in a neutral space. This tripartite model reflects an acceptance that no one society sector is responsible for tackling challenging issues, but that industry, government and civil society all have a role and responsibility. Although not primarily concerned with

³¹ Urbis, Keys, Young, *External Review of the Energy & Water Ombudsman NSW (EWON), Final Report*, 2002.

³² EWOV, *Resolution 21* (1 July 2005 – 31 December 2005) p 1

³³ <http://www.melbourne.org.au/>

consumer issues, its inclusiveness and lateral thinking about the ‘challenges of thinking limiting the success of Melbourne’ has meant it has addressed consumer issues in its projects. In particular, its Utility Debt Spiral project is a significant initiative in the utilities area:

The Utility Debt Spiral Project (the Melbourne Model in action) is a joint research project initiated by the Committee for Melbourne under the auspices of the UNGC (United Nations Global Compact) Cities Programme.

The Project is based on the premise that water, electricity and gas bills can be a significant factor in personal debt spirals and the poverty trap.

Applying the Committee for Melbourne-developed Melbourne Model, the Project has harnessed the expertise and involvement of business, government, regulators, and civil society project partners to test this premise, and to examine and identify potential means of ameliorating the impact of utility bills as a direct cause of, or exacerbating factor in the debt spiral³⁴.

One product of this work is particularly relevant. *Supporting Utility Customers in Financial Hardship: Guiding Principles* was launched by Victoria’s Minister for Energy, Resources and Victorian Communities on 16 March 2007. This guide to best practice is an authoritative reference drawn up by a voluntary group working together over a considerable period. It is positioned to be influential and authoritative and to produce improved outcomes for low-income and vulnerable consumers without the need for any significant participation by government. However, this model needs the auspices of a respected and high profile organisation such as the Committee for Melbourne.

³⁴ <http://www.melbourne.org.au/120.0.html>. The Melbourne Model, as used in the Utility Debt Spiral Project, is the key driver within the UNGC Cities Program, which aims to resolve complex urban issues. This program uses all sector taskforces, based on the Melbourne Model. The international secretariat for the program is in Melbourne, the only United Nations secretariat in Australia. The program is now working with 15 cities across the world, including Berlin, San Francisco, Jinan (China) and Porto Alegre (Brazil).

Policy tools – disadvantaged and vulnerable consumers

What interpretation of the terms vulnerable and disadvantaged should be applied for the purposes of consumer policy? Are the needs of vulnerable and disadvantaged consumers best met through generic approaches that provide scope for discretion in application, or through more targeted mechanisms?

In Victoria, some effort has been made to develop a working definition of hardship, rather than defining vulnerability or disadvantage. There has been some consensus around the definition used by the VESC in reviewing the hardship policies of water businesses and authorities. This definition is specific to utilities:

*A customer in hardship is someone who is identified either by themselves, the water business, or an independent accredited financial counsellor as having the intention but not the financial capacity to make the required payments within the timeframe set out in the business's payment terms.*³⁵

Another approach to hardship is that used in the Committee for Melbourne's 2004 *Utility Debt Spiral Report*, referred to above. In this report, hardship was seen as having a particular meaning that refers to self-reported financial difficulties.³⁶ One analysis cited in this report was that of J.R. Bray who defined 'hardship' as: being unable to afford heating or meals; having to pawn possessions; or needing assistance from community organisations.³⁷

ANZEWON members all find that hardship and affordability issues lie behind a significant number of the cases that come to our services, especially billing and disconnection cases. We welcome the measures that are being taken in a number of jurisdictions to address the cycle of bills, reminders, disconnection and reconnection in which many low-income consumers can be trapped. The possibility of disconnection from the essential services of electricity and gas and restriction of water gives hardship issues in the utility industries a heightened focus that may not be possible through generic regulatory approaches alone. Disconnection and the importance of offering customers experiencing financial hardship opportunities to manage their energy (or water) payments requires a targeted approach, as outlined in our discussion of hardship programs earlier in this submission.

³⁵ ESC *Review of Water Businesses' Hardship Policies (December 2006)* p 3 and 16

³⁶ *Utility Debt Spiral Study: A joint community, government and business initiative designed to explore the relationship between utility debt and poverty, and to identify social and regulatory frameworks and policies to assist people at risk* Committee for Melbourne, 2004, p 25

³⁷ *Ibid* p 30, referring to Bray, J.R. (2001) *Hardship in Australia: An analysis of financial stress indicators in the 1989-99 Australian Bureau of Statistics Household Expenditure Survey*, Occasional Paper No 4, Department of Family and Community Services, Canberra.

In some instances – and to their credit – such hardship programs have been developed solely by retailers. Nonetheless, a number of jurisdictions have mandated such programs (Victoria) or appear likely soon to do so (New South Wales). ANZEWON supports these developments where they incorporate the following principles:

- the electricity/gas supply will not be disconnected solely because of a customer's inability to pay for the electricity supply; and
- the electricity/gas supply to premises should only be disconnected as a last resort; and
- there should be equitable access to financial hardship programs and that the policies behind such programs should be transparent and applied consistently.³⁸

What are the examples of policies that are very effective in targeting vulnerable and disadvantaged consumers? Are there instances where a desire to protect these groups has imposed significant net costs on the wider community?

Industry-based policies that are particularly effective in targeting vulnerable and disadvantaged consumers are the hardship programs and policies adopted by retailers, either on their own initiative or through the encouragement of regulation. The elements of these hardship programs that make them effective in assisting vulnerable and disadvantaged consumers include:

- the establishment of a specialist team that deals with customers in hardship
- adequate empowerment of that specialist team
- comprehensive training of both the specialist team and customer service representatives who refer customers to the specialist team
- a respectful and non-judgemental approach to customers in hardship
- willingness to work towards achieving engagement with the customer
- active communication about the policy and program to appropriate social advocacy organisations and financial counsellors, as well as to ombudsmen schemes
- realistic and affordable payment plans for the customer regardless of the amount of arrears involved
- incentives to assist customers, eg the company will match the customer's payment after a period of payment; the company will waive all administrative fees on the account after a period of payment, and
- the incorporation of advice about efficient usage of utilities.

From ANZEWON's experience, those energy and water suppliers who adequately resource their customer hardship programs have reported no net costs on the wider community, but have instead found their programs to be good business and sensible investments. One measure of their success has been a reduction in the number of hardship cases brought by customers or their advocates to ANZEWON's member schemes.

³⁸ The *Electricity Industry Act* 2000 (Vic) section 45(2) and the *Gas Industry Act* 2001 (Vic) section 48I(2)

In terms of regulatory policy, the Retail Codes that exist in various states contain provisions which are helpful for vulnerable and disadvantaged consumers:

- limitations on the amounts that can be taken as security deposits and rules about how such deposits must be handled and returned
- bill review requirements, including requirements about payments during the course of a dispute
- requirements relating to undercharging, including limits on how far back a retailer can go in recovering undercharging
- requirements relating to overcharging and the return of overcharged amounts
- requirements about accepting payments by a variety of methods. New South Wales requires local retailers to operate a payment plan for small residential customers experiencing financial difficulties. As mentioned, Victoria requires retailers to establish a hardship policy for domestic customers, and payment plan requirements also apply in South Australia, Queensland, Western Australia, Tasmania and the ACT, and
- limits on the right to disconnect, for example, after 2 pm or 3 pm on a business day or on a Friday, weekend, public holiday or day before a public holiday.

Regulators also have policies and procedures which are helpful in targeting vulnerable and disadvantaged consumers, including such initiatives as:

- monitoring and reporting publicly on disconnections
- publishing guidelines on financial hardship, and
- running campaigns aimed at hard-to-reach consumer segments about responding to marketing, for example, the *Energy Choice* campaign in Victoria.

Governments also undertake legislative changes that benefit vulnerable and disadvantaged consumers in response to policy issues. The following examples come from Victoria:

- a prohibition on charging late payment fees to small retail customers
- the introduction of the Wrongful Disconnection Payment whereby consumers who have been disconnected other than in accordance with the terms of their contract are compensated (\$250 per day or part thereof pro rated)
- the requirement on all licensed utility providers to have a hardship policy as a condition of their licence, and
- a requirement that providers not disconnect a customer who is enrolled in a hardship program and is complying with that program.

The Government of Victoria has made funding available to local retailers to assist with the implementation of hardship programs: for each customer on a standing tariff, \$8 has been made available to companies, over two years.³⁹

³⁹ ESC, *Energy Retail Business, Comparative Performance Report for the 2005-06 Business Year*, p.6

Vulnerable and disadvantaged people, as well as people reliant on fixed incomes, are particularly affected by the payment arrangements for energy and water: they use services and are billed in arrears (usually quarterly) for what they have used, making it particularly difficult to control expenditure and to budget for the cost. An alternative to this approach is the prepayment meters that are in use in Tasmania and beginning to be used elsewhere, for example in South Australia. Increasing numbers of Tasmanian consumers have chosen to pay by this method (currently around 43,000 customers or approx 20% of the customer base). These consumers cite the advantages of prepayment meters as including the ability to pay small regular amounts for their electricity and subsequent freedom from large quarterly bills, and the greater understanding of their electricity consumption provided by the meters. ANZEWON supports payment choices such as prepayment meters being made available to those consumers who might benefit from such alternative payment methods, but emphasises that prepayment meters must be freely chosen by the customer and in no way imposed.

A study of consumer views of prepayment meters by the Tasmanian Council of Social Service⁴⁰ found 94% consumer satisfaction with the meters. A higher percentage of customers with prepayment meters were on concessions compared with those with standard meters: 39% compared to 29%, suggesting that the meters are a viable alternative for low-income consumers. ANZEWON remains deeply concerned about the impact of disconnection on individuals and families already struggling to meet a range of daily living needs. There are health and safety issues in disconnection, as well as severe disadvantage for children and other vulnerable people. Prepayment meters are not the answer to disconnection rates across Australian jurisdictions, but may assist some low-income customers by adding to the range of manageable payment options available to them.

⁴⁰ *Pre-payment meters in Tasmania: consumer views and issue* A research project carried out for the Tasmanian Council of Social Service by Urbis Keys Young (August 2006)

Generic v industry-specific regulation

How effective are the generic provisions in the TPA and Fair Trading Acts in meeting their intended objectives? What, if any, changes are required to deliver better outcomes?

The *TPA* and *Fair Trading Acts* prohibit

- misleading and unconscionable conduct
- false or misleading representations
- harassment and coercion.

Generic provisions such as these can be applied to many industries, including new industries, and are a sound basis for regulating market behaviour. It is often necessary however, for industry-specific complementary guidelines or codes that deal with the specific nature of conduct in particular markets. Jurisdictional regulations and codes such as the *Marketing Codes of Conduct* that operate in Victoria, New South Wales, South Australia and (from 1 July 2007) Queensland fill the gap between generic legislation and the particular risks to energy consumers posed by their exposure to unscrupulous marketers.

Enforcement of breaches of generic legislation is not always effective. Industry-specific regulation can offer a greater level of scrutiny of market behaviour and early intervention when a market participant breaches a specific rule, code, regulation, licence condition or guideline, as Consumer Affairs Victoria has noted:

Objective rules, which are more common in industry-specific regulation, make it easier to gauge the extent of the breach and make prosecution less dependent on proving that the intention or the outcome of the breach would damage consumers. In addition, the regulator is more likely to be able to use its own testing to obtain the evidence necessary to prosecute an offender. It is less reliant on the participation of consumers.⁴¹

What principles should guide the choice between generic and industry-specific regulation? How well does the current mix of regulation accord with these principles?

There is a spectrum of consumer protection ranging from protections common to all products and services (for example, full product disclosure) to more specific protections that might apply solely to some products and services. Those specific protections apply because of the special characteristics of those products and services, such as their non-discretionary nature.

⁴¹ Consumer Affairs Victoria, *Choosing between general and industry specific regulation*, Research Paper No. 8, November 2006, p11

As a statement of principle, generic consumer protection, where possible, is to be preferred to industry-specific protection. It can be simpler for both consumers and industry, and it makes education and information campaigns more straightforward. However, because generic consumer protection does not offer sufficient protection to consumers in the complex and changing competitive energy retail markets, industry-specific regulation has been needed to fill the gap.

Energy and water have such special characteristics as those indicated above, not least because they are essential services not referenced in generic consumer protection legislation. In some cases, where the businesses that provide these services have a monopoly over supply, the consumer is not able to choose their provider or retailer. Another characteristic that sets the energy and water supply industries apart is the devastating impact that disconnection (or restriction in the case of water) of supply can have on consumers. Unlike many other goods and services, a consumer who faces disconnection of supply for credit reasons is unable to obtain supply elsewhere. Critically, loss of supply of energy or water can have immediate and serious impacts uncommon for other services:

- adverse physical, psychological and emotional health impacts
- exposure to unsafe living conditions with the use of candles for lighting and kerosene for heating (especially in proximity to children)
- consequential losses, such as food spoilage
- significant lack of amenity
- impact on parenting ability
- reduced ability to maintain contact with the outside world.

Given the range and profundity of such impacts, ANZEWON members consider that the requirement for industry regulation remains high, regardless of the relative competitiveness of the energy retail market. It is hard to conclude other than that industry-specific regulation will need to be maintained.

A further argument for the need to ensure ongoing industry-specific regulation for energy and water is the complexity of service delivery and business relationships. The energy industry consists of large scale, multi-layered and interconnected infrastructure networks which create complexities (such as the triangular consumer-retailer-distributor relationship) unique to those industries. It is common for EIOSA, EWON and EWOV to receive complaints in which multiple retail and distribution entities are involved and which require close attention to business-to-business rules and market operation rules. It is difficult to imagine a circumstance in which generic regulation would be able to sufficiently well address these complex relationships.

Is industry-specific regulation particularly well suited to some areas? Are there examples where specific regulation has been helpful in putting a particular sector on notice? To what extent has the growth in specific regulation reflected inadequacies in generic regulation or its enforcement?

As already noted, the Victorian legislative amendments to mandate hardship policies for electricity and gas providers are an example of an industry-specific regulatory/legislative approach. To the extent that it focused on disconnection, a specific characteristic of those industries, it could not have been incorporated in generic legislation. The existence of the Victorian legislation has influenced other jurisdictions to respond more adequately to customer hardship.

Marketing is an area where there is currently both generic provision through the Fair Trading Acts and industry-specific provision through the marketing codes that exist in New South Wales, Victoria and South Australia. ANZEWON members, as stated previously, envisage that there could be a generic approach to marketing, but only if the generic approach included the superior protections currently available through the marketing codes. There is a need for industry-specific regulation where the generic law is less effective than it needs to be.

Another area where industry-specific regulation has provided clear benefit to all parties has been where Victorian consumers have experienced property damage as a direct result of voltage variation (power surges, outages) on the network. Currently such regulation only exists in Victoria but it has been of great value there in resolving issues quickly for consumers and minimising the need for ombudsman intervention.

In New South Wales, where no regulation exists to address this area and where little or no legal precedent is in place, much of the responsibility for seeking redress for customers whose claims have been rejected by their supplier has fallen to EWON, leading to a large number of Ombudsman Determinations – sometimes for as little as \$60. This is clearly not an ideal situation, particularly where the time and cost of conducting such investigations often significantly outweigh the compensation sought. It is ANZEWON's view that in areas such as these there is considerable advantage for all parties in the clarity that accompanies an industry-specific regulation.

Enforcement and redress issues

Are the current dispute resolution mechanisms and arbitration processes, including consumer tribunals, readily accessible and effective?

Specialist energy ombudsmen exist in all Australian states (and, for New South Wales and Victoria, water). The oldest ombudsman scheme, EWOV, was established 11 years ago and the most recent, Queensland, is to commence operations in mid-2007. These schemes have been successful because they have adhered to the established benchmarks for industry-based customer dispute resolution: accessibility, independence, fairness, accountability, efficiency and effectiveness.⁴² In the years of their operation, ANZEWON schemes have handled hundreds of thousands of consumer contacts and closed in excess of 175,000 files.

Our schemes have been consistently shown to be accessible and effective. Accessibility is achieved by the phone-based nature of the service, the informality of our processes and the fact that the service is free to consumers. Given the nature of the jurisdiction, ANZEWON schemes have put a premium on community outreach and education, particularly as a sizeable proportion of those who contact an energy or water ombudsman are low-income or otherwise vulnerable consumers. Publications are available in major community languages (EWON, for instance, publishes educational and other materials in 17 languages). The schemes also conduct forums and other events across urban, regional and rural areas to promote access to our services and other assistance to consumers.

A large part of the success of the schemes has been our ability to resolve complaints in a fair, reasonable and expeditious way, with the large majority of matters being finalised in a matter of days. We provide significant reporting to industry and other stakeholders as a means of highlighting systemic and topical issues and assisting industry to improve standards of service delivery to customers, and work closely with regulators and policy makers to this end.

⁴² Consumer Affairs Division, Department of Industry, Science and Tourism, *Benchmarks for Industry-Based Customer Dispute Resolution Schemes*, 1997.

Self and non-regulatory approaches

What principles and considerations should guide the use of self-regulatory, co-regulatory and non-regulatory options in the consumer policy framework? What are the best examples of effective self-regulation, co-regulation and non-regulatory approaches and why have they worked well in these cases? Is enough use currently made of such measures? If not, where are the main opportunities for further uptake?

Notwithstanding our support for industry-specific regulation in energy and water, ANZEWON believes that there is a place for all types of regulation: self-regulation, co-regulation and non-regulatory approaches. We have had some positive experiences with self-regulation, for example, EWOV now provides a complaint-handling service for LPG customers as a result of a self-regulatory code,⁴³ sign-up to which mandates membership of EWOV. The five LPG retailers that belong to EWOV as a result of their sign-up to the code are the only members of the scheme who are not subject to requirements either in licence conditions or legislation to belong to the scheme. Another example that applies to both Victoria and New South Wales is the development of hardship policies and programs by some retailers in advance of regulatory requirements.

This submission has already cited the work of the Committee for Melbourne, which is an example of a non-regulatory initiative producing positive changes to the benefit of consumers.

Would there be benefits from government support for a consumer advocacy body and would they outweigh the funding and other costs involved? Should such a body's role be limited to advocacy, or should it also be responsible for bringing forward consumer complaints? Do consumer advocacy bodies adequately represent the interests of all consumers? If not, what other means could be used to elicit the views of consumers? Is there a need for greater research into consumer and market behaviour to inform policy development? If so, who should be responsible for carrying out and resourcing such work?

As stated previously, ANZEWON supports government initiatives to create more opportunities for consumer voices to be heard in the regulatory debate. The absence of an effective consumer voice can lead to unsustainable decisions, regulatory gaps, and the revisiting of decisions.

However, such a consumer advocacy body should not double as a dispute resolution or investigation body for resolving consumer complaints. Advocacy and dispute resolution need to be kept separate because dispute resolution needs to be independent and impartial whereas advocacy, by its very nature, takes up positions on behalf of particular groups. The Commission may be interested in the consideration currently being given to the

⁴³<http://www.doi.vic.gov.au/Doi/Internet/Energy.nsf/AllDocs/03C0C2FE8460D174CA2570490017B918?OpenDocument>. Although the code is self-regulatory there was considerable government involvement in its development.

separation of the complaints and advocacy functions of energywatch in the United Kingdom.

ANZEWON suggests there is a need for greater research into consumer and market behaviour to inform policy development. The Commission itself has cited research into behavioural economics as giving valuable insights into what kinds of policy initiatives may be effective. There are some centres based within universities that have done valuable work, such as the Communications Law Centre at Victoria University and the Centre for Credit and Consumer Law at Griffith University. There are also some models for funding research such as that of the Consumer Utilities Advocacy Centre in Victoria and the Utility Consumers' Advocacy Program in New South Wales. There would be merit in a more systematic and broad-based approach to research into consumer and market behaviour.

Jurisdictional responsibilities

What are the main areas of duplication, overlap and inconsistency in consumer regulation across jurisdictions (and with New Zealand)? How significant are the costs of this inconsistency, overlap and duplication relative to any benefits provided?

ANZEWON believes that it makes good sense to have consistent consumer protection laws throughout Australia and New Zealand from both a business and a consumer perspective. It is a significant impost on energy retailers trading across states to have to manage different jurisdictional variations and consumer frameworks. It is also unfair for energy consumers if, for example, in one state they have a 10-day cooling-off period and in another state they have a five-day cooling-off period. However, it is important that consumer protection laws adopt the best from the existing consumer protection frameworks rather than ‘the lowest common denominator’. ANZEWON has strongly advocated this position in the move to national regulation of the energy market.

Are there areas of regulatory responsibility that could readily be consolidated within one level of government? Are there areas which could be harmonised across jurisdictions? What particular considerations arise in relation to facilitating greater integration with New Zealand and international trade more generally?

This submission has already referred to marketing as an area in which there could be a national, rather than a jurisdictional, approach. Some ANZEWON members have made detailed submissions to the Ministerial Council on Energy’s (MCE) consultation process over national regulation of energy which address this question in detail. We have attached a number of these submissions for your consideration.

Regulatory and oversighting bodies

Are the Ministerial Council arrangements working well? If not, what changes are required? Would changes to other policy oversighting arrangements help to deliver better outcomes for consumers?

ANZEWON members have been active participants in the Ministerial Council on Energy (MCE) processes, both through substantial submissions and through participation in the Stakeholder Reference Group. Although the workload has been heavy and the timelines short, it has been important to be involved in a process that has been considering the basic principles of appropriate regulation. We refer the Commission to the attachments to this submission (i.e. various ANZEWON scheme responses to the recent Working Papers of the Retail Policy Working Group of the MCE) for valuable summaries of the jurisdictional differences to many policy issues, especially Working Paper 1 which dealt with issues of relevance to consumers. Consumer policy is often developed in a reactive and piecemeal way. The MCE process has been a proactive and considered process and ANZEWON members are hopeful that the Standing Committee of Officials will take up many of the recommendations that have been made in the recent series of Working Papers. While we have reservations on some individual points, in general the process has included adequate consideration of consumer interests and has looked at jurisdictional variations with a view to best-practice consumer protection.