

**Electricity Issues:
Interstate perspectives on full retail competition
for residential consumers**

**Centre for Credit and Consumer Law
Griffith University**

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Acronyms

- ADR – Alternative Dispute Resolution
- AEMC – Australian Energy Market Commission
- CBA – Cost Benefit Analysis
- CCCL – Centre for Credit and Consumer Law
- CCSA – Conservation Council of South Australia
- CLCV – Consumer Law Centre Victoria
- CSO - Community Service Obligation
- CSR – Corporate Social Responsibility
- CUAC - Consumer Utilities Advocacy Centre
- CWO - Community Welfare Organisations
- DHS - Department of Human Services
- ECC – Energy Competition Committee
- ECPO – Energy Consumer Protection Office
- EDR – External Dispute Resolutions
- EIOSA – Energy Industry Ombudsman South Australia
- EOT – Energy Ombudsman Tasmania
- ERAA - Energy Retailers Association of Australia
- ESC - Essential Services Commission
- ESCC – Essential Services Consumer Council
- ESCOSA – Essential Services Commission of South Australia
- EWON – Energy and Water Ombudsman New South Wales

EWOV – Energy and Water Ombudsman Victoria

FRC – Full Retail Competition

IPART - Independent Pricing and Regulatory Tribunal

LAQ – Legal Aid Queensland

NEM – National Electricity Market

OFGAS - Office of Gas Supply

OFGEM - Office of Gas and Electricity Markets

PIAC – Public Interest Advocacy Centre

SACOSS – South Australian Council of Social Service

SOC - State Owned Corporation

TIO – Telecommunications Industry Ombudsman

URGs – Utility Relief Grants

WREAG - Western Region Energy Action Group

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Introduction

The impetus for this series of Issues Papers was the Queensland Government's announcement in late 2005 that Full Retail Competition¹ (FRC) would be introduced into Queensland's energy (electricity and gas) sector. The introduction of FRC from July 2007 for residential consumers and small businesses means that, for the first time, many Queenslanders will be able to choose whether or not to continue with the government's uniform tariff or enter into a market contract with the retailer of their choice. Consumers living in south-east Queensland are likely to be the main candidates who will be offered market contracts. New retailers are expected to enter the market to compete with government owned corporations: Energex and Ergon.

This is a critical time. The Queensland Government can benefit from the experience of other Australian jurisdictions who have already introduced FRC (New South Wales, Victoria, South Australia and the Australian Capital Territory) and overseas jurisdictions (United Kingdom, New Zealand, North America). Consequently the Government has the opportunity to see what will work and what will not work in terms of technical and regulatory processes. It is too early to comment on the outcome of the implementation process for consumers in Queensland but it is timely to assess where the process is and 'troubleshoot' the potential problems for consumers. What lessons can be learned from interstate experiences? Who are the real 'winners and losers'? These Issues Papers go some way to answering these questions from a consumer perspective.

1. National Background to the Introduction of FRC

The introduction of FRC in Australia is part of a range of National Competition Policy reforms. Public utilities, including electricity generation, transmission, distribution and retailing utilities, which have traditionally been government monopolies in Australia are firmly part of this structural reform.² Part of the underlying assumption in National Competition Policy is that market place competition will benefit consumers through increased choice and lower prices – along with creating more efficiencies and cost savings. Consumers in Queensland have been told of potential savings of up to \$150 per annum with the introduction of FRC.³

The introduction of FRC may bring the benefits of competition but it also places responsibilities on government to ensure the market is operating ethically. There is a tension between market driven competition policy and the attribute of electricity as an essential service; the latter necessitates a standard level of protection for consumers in the market place unnecessary for non-essential services.⁴ Moreover, competition alone is not sufficient to protect customers from poor

¹ The term 'competition' and 'contestable' are used interchangeably in these Issues Papers. The use of the term competition (as opposed to contestability) is a more recent usage of terminology.

² Productivity Commission (2005), p 403. See also Council of Australian Government (2002).

³ Editorial (2001) *The Courier Mail*, September 30th 2005, p 18.

⁴ Essential Services Commission (June 2004, Overview Paper), p 5, cited in Consumer Law Centre Victoria (2006), p 33; Consumers Utilities Advocacy Centre (2006), p 11; see also Committee for Melbourne (2004), p 3.

service outcomes particularly in emerging markets where there are insufficient established quality competitors to offer the benefits of competition.⁵

1.1. The NEM

The national electricity reform process has numerous components. A major reform occurred in 1998 when the National Electricity Market (NEM) began operating as a wholesale market for the supply of electricity in Queensland, New South Wales, the Australian Capital Territory, Victoria and South Australia. Tasmania joined the NEM in 2005.⁶ A key associated component of this reform was the establishment of inter-state interconnectors to facilitate the flow of electricity across borders. The generation market was also opened up to private operators.

Other key features of the electricity reform process include:

- varying positions and decisions of individual governments on the sale of publicly owned distribution, retail and generation assets (Victoria and South Australia privatised and NSW and Queensland retained public ownership); and
- the introduction of FRC for larger customers in all jurisdictions and for small customers in all except Queensland and Tasmania

1.2. Queensland background to the introduction of FRC

The Queensland Government's decision making on FRC has been heavily influenced by the results of cost benefit analyses (CBAs) prepared for it by consultants. The first was undertaken in 1999 and the second in 2005. Both CBAs came to very difficult conclusions, as summarised below.

1.2.1 Cost-Benefit Analyses

A 1999 CBA identified gains for large customers, particularly in South-East Queensland and competition was introduced for larger customers (above 200 MWh per annum).⁷

The main potential benefit of FRC identified in the report was lower energy bills. However, the report noted that in some parts of the state the introduction of FRC would result in higher electricity charges and that Community Service Obligation Payments would be 'adversely affected by the loss of cross subsidies from customers who choose contestable terms'.⁸ Two other key impacts were noted: the variability of annual electricity prices depending on the wholesale market price levels and volatility; and the fact that although some customers might initially benefit from FRC in the future they would face higher prices. At that time the Queensland Government decided not to proceed. The full report was never released to the public.⁹

⁵ Watson (2005), pp 4 – 5; Rich and Mauseth (2004), p 10; Consumer Law Centre Victoria (2006), p 18.

⁶ National Electricity Market Management Company (2005), p 7.

⁷ Queensland Treasury and PA Consulting (1999), p 6.

⁸ See n7, p 11.

⁹ The Courier-Mail newspaper described earlier Government attempts to introduce FRC as being shelved '...on the strength of a politically explosive report that warned while prices in the southeast corner could drop as much as 14 percent, power bills in heavily subsidised Mackay would leap by as much as 184 percent', No author stated (2005), 'Queensland Inc. Electricity reform steps up a notch', *The Courier Mail*, September 19th, 2005, p 16. See also n3.

The 2005 CBA on FRC indicated that the benefits marginally outweighed the expected costs of introducing competition in the residential consumer sector but suggested major reductions in consolidated revenue payments might occur.¹⁰ This CBA provided the justification for the Queensland Government to announce on 28 September 2005 that FRC would be introduced for the rest of the market on 1 July 2007. The consultants surmised that for the - 1.8 million urban residential and business customers living in South-East Queensland there would be reductions to the energy costs. This was not the case for rural and remote customers who were deemed unprofitable.¹¹

One of the limitations of a cost-benefit analysis is that it is a narrow, analytical and at times speculative tool that cannot take into account all the issues that impact on the potential outcome. Several key assumptions in the CBA will remain undetermined until FRC is implemented.¹²

1.2.2 Implementation of FRC in Queensland

The Queensland Government has appointed a three member Energy Competition Committee (ECC) to oversee the FRC implementation process. The committee is charged with managing all technical, policy and regulatory issues associated with the implementation of FRC in electricity and gas.¹³ Against this background the Queensland Government is engaging in massive capital expenditure on network improvements.¹⁴

It is clear that a number of changes to legislation, hardship policies and advocacy arrangements are necessary. A cost-benefit analysis is almost an entrée. But what will eventually get served up? The ECC recently released a Proposed Policy Position Paper on FRC and there are positive signs that the Queensland Government is responsive to residential consumer needs. For instance the ECC recommended that the consumer have a right to revert back to the fixed tariff following a market contract and that a retail code and independent energy ombudsman should be established.¹⁵ The policy paper is a good start but there is a long way to go.

¹⁰ GHD (2005), p 4.

¹¹ See n10, pp 4, 14 and 25; Energy Competition Committee (2006), pp 15 – 16. It should be noted that an added incentive for the Queensland Government to introduce FRC was the release of competition payments which had been withheld from Queensland because it had not implemented full retail competition. See National Competition Council, (2004) '2003 NCP assessment outcomes', Press Release; See n3.

¹² For instance, the loss of the Long Term Energy Procurement arrangements (LEP) could reduce the profitability of the state owned generators and therefore the dividends they can pay to government.; For mention of CBA's generally see Consumer Utilities Advocacy Centre (2006), p 10.

¹³ Energy Competition Committee (2006), p 5; Queensland Government, Statement of Reason, 25 November 2006 Qld; Queensland Government (2005) 'Queensland takes lead on National Gas, Electricity market Strategy', Media Statement, 22nd of December, 2005; James McCullough (2006), 'Shake-up for power assets', *The Courier Mail*, 16th of January 2006; Queensland Government (2005) 'Energy Competition Committee', www.energy.qld.gov.au/ecc.cfm.

¹⁴ Queensland Government (2005) 'Billion-dollar investment powers Queensland's energy needs – Qld. media statement', Media Release, 9th December, 2005; This capital expenditure is also a response to the Somerville Inquiry recommendations; Department of Natural Resources (2004), pp 8 – 11.

¹⁵ Energy Competition Committee (2006).

1.2. FRC To-Date: Mixed Success

Evidence from interstate and overseas, including evidence outlined in these Issues Papers, suggests that the jury is still out on the benefits of FRC for many residential consumers based on a range of indicators including service, price and market performance: the benefits are, however, clearer for industrial and commercial customers.¹⁶

In addition there are cost and environmental considerations. The introduction of FRC may well lead to a move towards more cost reflective (and therefore higher) prices. Cost-reflectivity reflects broader environmental issues of sustainability. The Queensland Government is increasingly promoting demand management strategies. For instance, it has begun adjustments to its electricity tariff structure moving from a declining block structure to a flat rate electricity tariff in order to better manage peak demand and provide incentives, particularly for large consumers, to reduce energy usage. While environmental considerations are beyond the scope of this paper they form another context, like service provision, in the delivery of FRC.¹⁷

2. The Issues Papers: A Summary

This series of Issues Papers, written by consumer advocates from states with FRC – New South Wales, South Australia and Victoria – offers an important alternative perspective on FRC to that of other stakeholders. Accordingly, it makes a vital contribution to the public debate on the implementation of FRC in Queensland.

Viewed as a whole the Issues Papers are chiefly concerned with the gap between what FRC may promise consumers, what in practice it has delivered and what strategies are required to ensure that, at the very least, no consumer is worse off following the introduction of FRC. Most writers are equivocal about the ultimate benefits of FRC for residential consumers and make a number of key points relevant to Queensland's situation. All emphasise that electricity is an essential service and note the variable success of FRC in Australia such as the exclusion of less profitable consumers from the market, evidence of customer inertia in switching retailers and the inability of retailers to self-regulate. All authors argue that a high standard of consumer protection is essential.

In the first Issues Paper, Jim Wellsmore focuses largely on the New South Wales and overseas experience and discusses the concept of consumer vulnerability, customer inertia, debates around the setting of prices and what kinds of protection consumers need in order to 'move freely between a regulated price and market supply and back'. He challenges the competition advocate perspective that competition is the best form of protection for consumers and points out that the presence of a competitive market 'does not alter the nature of electricity as an essential service'. He also identifies that the issue of affordability of electricity is a major issue for many customers, particularly those lacking in market power.

¹⁶ Bowman, Coghill and Hodge (2004); Brennan, (2005); Jewell (2003); Guthrie (2005); Kozakova (2005); Essential Services Commission (2004a).

¹⁷ Guthrie (2005); Queensland Government (2006), 'Savings add up with new energywise calculator', Media Release, 6th of January, 2006; Queensland Government (2005), 'Energywise campaign can save Queenslanders money', Media Release, 28th October, 2005; Queensland Government (2005), 'Flat electricity tariff provides fairer pricing system', Media Release, 4th of November, 2005; Total Environment Centre (2006), pp 2 – 10; This is also outlined on the ECPO website at www.ecpo.qld.gov.au.

In the second Issues Paper, Denis Nelthorpe identifies the need for appropriate retail codes and contracts based on the Victorian experience. He argues that unfair marketing practices, breaches of the *Trade Practices Act 1974* (Cth) and *Fair Trading Act 1999* (Victoria), increased billing and transfer errors ‘are all unavoidable consequences of a contestable market and must be anticipated and addressed by increased consumer protections and regulations’ including an Energy Retail Code and Code of Conduct for Marketing Retail Energy. He concludes that retail codes and effective market contracts comprise vital elements in jurisdictions with FRC.

In the third Issues Paper Andrew Nance hones his gaze specifically on the outcomes of the introduction of FRC in South Australia (SA). He points out the FRC story in South Australia appeared to be ‘creating activity and choice’ with record transfers of small customers to market contracts. However, he notes this was also accompanied by dramatic price rises for residents as the government sought to account for (and pass on) the costs of the total supply of electricity to customers. He sums up that there needs to be mechanisms in place to link public policy (especially social policy) with changes in the market. In this vein he concludes that there is a ‘widening gap between public expectations of the role of government in the provision of an essential service like electricity’ and what service the government actually ends up being able to provide.

In the fourth Issue Paper, Fiona Guthrie and Simon Cleary discuss another dimension to consumer protection – the necessity of having a robust complaint handling body in place. They write that the introduction of FRC brings with it new types of disputes, such as customer transfers, retailer marketing practices, and information provision, in addition to the pre-existing dispute issues of billing, disconnections and service quality. In contrast to Queensland’s current dispute resolution model, which sits within a government department, they argue that industry-based external dispute resolution schemes are the best model. It is pleasing that the Queensland Government’s ECC has recently proposed that, consistent with other jurisdictions, dispute resolution should be established independent of government.¹⁸

The last two Issue Papers by Elissa Freeman and May Mauseth Johnston, discuss the importance of hardship policies in a competition framework. Freeman focuses on retailer social obligations particularly in New South Wales and May examines hardship policies in Victoria. Both writers state that a useful and important distinction can be made between temporary and chronic hardship and that both retailers and government have an important role in ameliorating both forms of hardship.

The key issue Elissa Freeman identifies is that ‘when and how energy retailers seek to exhibit a sense of social responsibility can have big ramifications for customers in hardship’ particularly with respect to those customers suffering temporary hardship. She outlines the various government mechanisms that can be used to promote the social responsibility of retailers to reasonably manage utility debts and disconnection processes ‘with consideration of a household’s capacity to pay’. She discusses the pressure to inflate retail prices to encourage new firms into the market and notes a worrying trend in the increasing level of disconnection in New South Wales and Victoria under FRC. In conclusion she notes that experience in New South Wales and elsewhere indicates that while some energy retailers exhibit robust corporate social responsibility (CSR) practices others do not and therefore regulation of retailer hardship plans and CSR requirements is necessary.

¹⁸ See n15, p 30.

Finally, May Johnston makes a forceful case, based on the Victorian experience, for identifying the crucial role government has to play in ensuring the community can afford essential services including electricity. She identifies the need for government to accept their responsibility in ameliorating hardship through well considered policies directed at both those suffering chronic and temporary hardship. May identifies the need for early intervention schemes such as concessions and energy efficiency initiatives which aim to pre-empt the difficulties of payment. She writes positively about Victoria's model of energy concessions. Without these concessions she says there would be a substantial increase in the number of customers suffering energy related financial hardship and disconnection from supply.

3. Conclusion

The introduction of FRC is a foregone conclusion in Queensland – as it has been in other states with the exception of Western Australia and the Northern Territory. However, these Issues Papers indicate that social obligations to the community need to be addressed in the form of specific consumer protections that should be integrated into competition policy in a responsive and responsible way.¹⁹

The Consumer Law Centre Victoria (CLCV) has identified that 'broad social and environmental objectives of State and Federal governments' are integral to an effective energy and competition policy. Similarly the Public Interest Advocacy Centre (PIAC) in New South Wales emphatically makes the point that 'what is missing from the discussion of economic regulation of distribution is a reference to the public interest.'²⁰

Consumer empowerment is intimately related to government objectives aligned with this goal. The ECC's most recent Policy Paper states that the Government's objective is to ensure '...efficiently priced and reliable energy in Queensland while still taking into account its social equity objectives'.²¹ Given that electricity is an essential service it is vital that comprehensive social objectives are not lost in the move to FRC in Queensland for residential consumers. Competition need not be an anathema to residential consumers but as consumer advocates have pointed out, '...to achieve effective competition it is necessary that consumers are empowered and exercise market power'.²² If Queensland can get FRC right, then some residential consumers will be winners. Hopefully there will be no losers but based on the experience of other states this is not a foregone conclusion. As Jim Wellsmore concludes in his paper '... grafting onto markets for essential services the policy intent that no consumer should be worse off is not as simple as it might sound'.

¹⁹ As CLCV pointed out: 'consumer experience clearly shows, the assumption that competitive markets will automatically produce acceptable outcomes for consumers is flawed.' Consumer Law Centre Victoria (2006), p 31.

²⁰ See n19, p 26; Public Interest Advocacy Centre (2006), p 8.

²¹ See n15, p 6.

²² Rich and Mauseth (2004), p 1.

Issue Paper 1

Everyone's a Winner?: Price protection in retail energy competition

Jim Wellsmore

1. Introduction

Competition creates both winners and losers. It cannot be any other way. The supposed benefits of competition – such as greater efficiency, more innovation and lower consumer prices – can come about only if market participants face the threat of penalties for making the wrong decisions. So, a supplier in a competitive market who does not pursue the most efficient of the least costly means of delivering their product faces the risk of losing their share of customers in that market.

Suppliers, however, are only one part of a market – sellers need buyers. These too face the threat of market outcomes – of being on the wrong side of the ‘winners and losers’ divide. Making the wrong choice on price or quality can be costly for consumers.

The decision to introduce competition to the retail supply of energy shines a harsh light on the consequences of winning and losing. Governments that have chosen to introduce retail energy competition have done so for a variety of reasons. What they have in common, however, is a firm conviction that the downside of competition can be limited – that, as a bottom line, consumers will be no worse off. In effect, the promise is that no consumer will be a loser.

This paper assesses whether this assertion is correct: how do consumers fare in an FRC environment?

2. Which Consumers?

Electricity is an essential service. In societies such as in Australia there are very few households who have viable alternatives to consuming electricity in order to maintain a reasonable standard of living.

The importance of electricity to most Australian households is illustrated by the steps they often take in response to losing supply. Recent research into the impact of disconnections of utilities in situations of hardship revealed the burden of losing supply in terms of anxiety, worsened health, higher costs and negative effects on employment and study.²³ In coping with the loss of electricity many households resort to such measures as staying away from their home or sending some members of the family (mainly children) to a relative or friend, spending less on food, borrowing facilities or electricity from friends and neighbours, and even using candles and fires for light and cooking.

²³ Ross, Wallace and Rintoul (2005).

Affordability of electricity is therefore an issue of major concern for the community. Many governments have responded with programs designed to assist families in hardship pay their electricity bills or community service obligations (CSOs) that subsidise the providers for the assistance they give these households.

Much discussion and government policy in the design of full retail competition (FRC) focuses on issues of 'vulnerable' customers. This can be a misleading term since it often is taken to imply that it is an easy task to identify those consumers or households who merit 'special' assistance. Certainly there are households who will face difficulties in paying their electricity bills. However, the research undertaken in my organisation – the Public Interest Advocacy Centre (PIAC) - has shown it is not a simple task to identify these consumers in advance.

In any event, it is wrong to think that the potential losers from the introduction of FRC are restricted to a rump of consumers who can be addressed with a discreet 'hardship' program.

Many, perhaps most, Australian households simply are not in a position to take advantage of the purported benefits of electricity FRC. The reasons will be explored briefly below. It must be remembered that the character of electricity (and gas, for that matter) as an essential service means that residential consumers are 'price takers'. The majority will remain in what effectively is a situation of monopoly supply – unable to opt for a new supplier or unable to capture any benefit from the introduction of retail competition.

The cost-benefit analysis prepared for the Queensland Government makes it clear that only a minority of consumers can expect to be winners from FRC in that State – perhaps as many as one quarter after five years of competition.²⁴ Furthermore, it appears that these consumers are expected to be highly concentrated in only the South-East region of the State.

3. What Choice?

The lack of clear benefits is an important reason why many consumers do not take up the option to switch energy retailers. In New South Wales research by the economic regulator (IPART) shows that of those households who are offered a 'competitive' or market contract for electricity only around one fifth decide to switch.²⁵ Largely this can be attributed to customer inertia – the unwillingness of customers to switch retailers when there is only a small increase in benefit to be had. Research commissioned by IPART in 1997 had not only predicted this problem but tried to calculate the size of the benefit needed to overcome inertia – around \$100 per year savings or about 15% of what was the average household bill.²⁶ A Victorian report suggested that by mid-2004 (more than two years after the start of FRC) as few as 10% of residential customers had approached a retailer regarding a market contract for electricity.²⁷

²⁴ GHD (2005), pp 4 and 9 (figure 1).

²⁵ Independent Pricing and Regulatory Tribunal (2004), p 39.

²⁶ SRC International (1998), p 65. The report notes that this saving would effectively require the elimination of the entire retail component of bills.

²⁷ Essential Services Commission (Victoria) (2004) p 69.

An important factor in customer inertia is what is termed ‘transaction costs’ – readily understood as the effort required to find and comprehend the details of various competing offers (think of mobile phone contracts).

In response, many policy advisers and retailers have argued that effective retail energy markets require retail ‘price headroom’. This takes the form of an additional margin imposed on customers of incumbent retailers which allow ‘space’ for competing new-entrant retailers to ‘undercut’ the prices offered to household users of energy. The inclusion of headroom is one of the reasons why South Australian households experienced a 25% increase overnight with the introduction of FRC in that State.

The precise numbers of household consumers who are willing or able to switch retailers are uncertain, even in markets where FRC is well established. In Australia, published data on ‘small’ customer switching covers all those using less than 160MWh of electricity per year. Yet, for example, the ‘average’ household in New South Wales consumes around 8MWh per year. Retailers hide the number of their ‘market’ customers from scrutiny, citing reasons of ‘commercial-in-confidence’. Governments do little to clarify the claimed figures, often because they are anxious to portray their competition policies as being successful. The real rate of switching or ‘churn’ is further confused by the inclusion in official data of residential users who switch back to their incumbent retailer on a ‘default’ contract and even those who move house to another regulated price contract.

Even so, almost four years since the introduction of FRC in Australia the churn rates in most areas remain very low. A report commissioned by IPART in 2004 (again, after more than two years of FRC) revealed a churn rate of only 12% for the *entire* small (ie. below 160MWh) customer segment.²⁸ That study also confirmed that the rate of churn declines for customers with lower levels of consumption.

Churn rates have been higher in South Australia. No doubt this has been assisted by massive price hikes imposed by the regulator, including retail price headroom intended to drive competitive offers and customer switching.²⁹ It also will have been helped by a State Government policy to pay \$50 to holders of concession cards who opted to take up a market contract – albeit at a much higher price than was available prior to FRC.

In Britain, retail competition appears to be more successful. Official data there has the rate of switching by households at around 50% after six years of the competitive market. Of course, one can see readily enough that this means around half of all households continue to miss out on market offers (and lower prices) for the supply of energy.

Retail energy competition has proven spectacularly unsuccessful in the USA. Less than half of USA jurisdictions have introduced customer choice. After five years of retail competition in a number of those States less than 5% of household customers have moved to a competitive retailer.³⁰ The picture is complicated by some jurisdictions in the USA having given customers a

²⁸ PricewaterhouseCoopers (2004), p 7.

²⁹ Essential Services Commission of South Australia (2002), p 8.

³⁰ National Association of State Public Interest Research Groups (PIRGs) (USA) (2004), p 98. The state PIRGs are a national network of state-based, nonprofit, nonpartisan public interest advocacy organizations working on consumer,

price cut in advance of the start of competition. However, in Pennsylvania there was a decline between 2001 and 2004 in the number of households signed up to ‘alternative’ retailers.³¹

These results are not wholly explained by customer inertia although, as noted above, many customers seem satisfied with their current energy supply arrangements – save for dramatic changes in those arrangements such as seen in South Australia (the regulator there reporting 46.8% of ‘small’ customers having moved to market contracts by the end of October 2005).³²

In fact, customer inertia tells us very little about ‘choice’. A competitive market does not alter the nature of electricity as an essential service. Since household consumers largely remain price-takers in any market for electricity it is clear that the real exercise of choice belongs with the retailers. This is demonstrated in research commissioned by IPART in New South Wales which shows that retailers are offering competitive retail energy contracts to only some 30% of the market.³³ The Victorian regulator has reported the same narrow targeting of customers by retailers in that State.³⁴

Despite this, many energy retailers and competition advocates continue to assert that competition alone is the best form of protection for consumers.³⁵

4. Which Price?

The reason for this narrow targeting of customers is clear enough – many households simply are not profitable enough for the retailers. Those with low consumption in many cases do not buy enough kilowatt hours of electricity to pay back all the costs of their supply. Small households, many low-income people and those living in small residences (i.e. less likely to have large air-conditioning units or pool pumps) fall into these groups, as do almost all rural consumers. Interestingly, many tenants fall into this same category even where a large family is concerned since their tenure often is shorter than the payback period for retailers offering market contracts (three years being the standard term in New South Wales).

On the other hand, we can see this issue as the difficulty facing retailers who try to undercut the ‘standard’, regulated prices. The modern approach to setting prices for utilities includes costs of supply which are ‘efficient’ - that is, the best investment in equipment and staff but at the lowest price. In addition there is an allowance for a commercial profit calculated in part by factoring in the low risk of supplying essential services to largely captive consumers. As a result the margins contained in the default prices are not large.

The dilemma for the competition advocates, and for the would-be new entrant retailers, is that it obviously is difficult to have prices based on costs that are lower than ‘efficient’. Different

environmental and good government issues.

³¹ Essential Services Commission of South Australia (2002), p 8.

³² Essential Services Commission of South Australia (2005a). As noted in this report, the churn of households within the category of ‘small’ customers needs to be seen in the light of the regulator having introduced retail price headroom and the South Australian Government offering a one-off \$50 rebate to concession cardholders.

³³ See n25, p 37.

³⁴ Essential Services Commission (Victoria) (2002), p 46.

³⁵ This claim, based on an ideological view of competition reform, has been sourced to Professor Stephen Littlechild, appointed by the then British Prime Minister Thatcher in 1989 as the first regulator of competitive energy markets in that country.

customers have different costs of supply. These can vary depending on where a person lives and the pattern of their consumption (for example, whether they use electricity mostly during periods of peak demand). The default price, then, reflects average costs. New entrant retailers may well be able to offer lower prices to customers who have lower costs of supply than this average. However, experience shows that this can be a very small proportion of the community.

The answer proposed by many competition advocates and the energy retailers is to introduce 'retail headroom' into the standard or regulated price. That is, artificially to raise the prices paid by the 'average' consumer so that it is higher than the level of efficient costs and a reasonable profit margin. This has the effect of increasing the number of households whose costs (and therefore potential prices) are below the average - thus providing space for retailers to undercut the standard price.

Calls for retail headroom have been issued regularly in New South Wales and Victoria by both the incumbent retailers and their 'second-tier' competitors. These calls have been opposed strongly by PIAC and other advocates. To date the regulators in these states have refused to use headroom to drive competition.

As noted above, however, the South Australian regulator explicitly included an allowance for headroom in the prices set for the start of retail competition in that State. This did not wholly account for the 25% increase in prices. Nonetheless, *prima facie* the padding of prices to encourage competition and customer switching has worked irrespective of the hardship it caused many South Australian households.³⁶

This is not to say that regulation is needed to introduce retail headroom into utility prices. In the USA, the State of New Jersey removed price caps several years after the start of retail competition with the result that most consumers received a 15% increase in their prices.³⁷

Britain moved to deregulate pricing in 2004 with the removal of the last price protection for 'small' electricity consumers. This was done in the face of evidence that at least half of all households were shut out from the competitive market. The fate of these consumers has been illustrated by an academic study of the retail gas market in the United Kingdom³⁸ that had been opened to competition earlier than electricity. Taking into account the switching behaviour of consumers and the commercial behaviour of the retailers the study concluded that consumers remaining with the incumbent supplier would face prices some 33% higher than those offered by a competing supplier. That is, the incumbent gas retailers, with the majority of consumers as a captive market, could charge prices 33% above the 'market price' before so many customers switched that the incumbents began to lose revenue.

5. What Protection?

Having established the need for price protection it is important to understand the limits of what it can provide. Generally what is offered to consumers is *retail* price protection. Many will

³⁶ A description of some of the impacts of the huge price hikes in South Australia can be found in Western Region Energy Action Group (2004).

³⁷ See n30, p 98.

³⁸ Giuletti, Waddams-Price and Waterson (2003), p 26.

understand this to mean some form of price cap – a limit on the maximum price a household will have to pay for their electricity (or other utility as the case may be). However, the supply of electricity actually requires four sets of activities – generation (or wholesale), transmission, distribution and retail. Of the final price paid by consumers only some 10% is needed to cover retail costs. ‘Retail price’ regulation tends to mean controls being established over the size of the retail component only.

The approach to retail price caps established in other Australian jurisdictions has been to allow the energy retailers to treat the other 90% of costs as a ‘pass through’. The regulated price initially will be set taking into account the likely costs of wholesale energy and the physical networks. However, since the final price charged by incumbent, regulated retailers is so dependent on costs from the rest of the supply chain the rules around price caps generally permit retailers to simply add to consumer prices any increases from further up the chain. Sometimes retailers are required to seek ‘approval’ from the regulator before doing this but in other cases the pass through is automatic.

In South Australia the regulator sets a ceiling on prices by taking account of costs right through the supply chain. In Victoria and New South Wales distribution prices are determined quite separately from any retail price limits. New South has formalised this with the ‘N+R’ approach to retail caps – R is the retail price component which is fixed for standard customers (and because of local circumstances includes an allowance for wholesale energy costs) while N is the 50% of prices derived from transmission and distribution and which can be passed through automatically.

As an example, in 2004 IPART issued decisions which lifted the cap for energy retail prices and authorised electricity distributors to increase their revenue (and, hence, customer prices). This would see electricity prices for standard customers rise by around 30% over the next five years. Yet in December 2005 the distributors returned to IPART asking for a further 8% hike in prices as a pass through of the costs of meeting new reliability standards.³⁹

While competition reform is not the sole cause of rises in electricity prices clearly it is not sufficient to focus solely on the retail component of prices.

Transmission and distribution networks are natural monopolies but regulators have moved to permit proxy markets for networks. In New South Wales and Victoria the distributors are permitted to earn a maximum revenue but they have some discretion to lift or lower prices for groups of consumers compared to an average price.⁴⁰ Importantly, there are limits to this discretion in the form of regulatory ‘side constraints’ – limits on changes to prices for individual consumers.

Wholesale electricity prices are rising. Since generation is regarded as a fully competitive market it is thought unnecessary to regulate these prices. At the same time governments and regulators have chosen higher wholesale prices as the source of future investment in generation.

³⁹ See Benson, S. ‘\$1.6bn to end blackouts’, *The Daily Telegraph* 7 December 2005. The details of the proposals by the distributors can be found on the IPART website.

⁴⁰ This is achieved through a complex formula used to calculate a ‘weighted average price cap’ for the distributors.

6. What Kind of Protection?

A key demand of PIAC and others in New South Wales prior to FRC was for consumers to have the ability to move freely between a regulated price and market supply and back. That is, a consumer should not lose the right to revert to a standard or default price simply because at one point in time they have chosen to test the waters of the competitive market.

A further, ongoing stance has been to oppose the incorporation of retail price headroom into regulated energy tariffs. After all, how can consumers be said to benefit by being exposed to prices which not only are higher than those pre-FRC but which recognise costs of supply which have been inflated deliberately?

The inclusion of side constraints in regulatory determinations of both retail and distribution prices is another ongoing issue for PIAC and others. While effective competition might, in theory, provide adequate protection for households it is clear that in Australia FRC is yet to deliver this outcome.

The benefit of these measures for households, especially those on low-incomes or facing other forms of hardship is a matter for ongoing attention. As was pointed out above, competitive markets demand losers to balance the winners. Those lacking economic power cannot expect to be protected or have their interests preserved in a market. Grafting onto markets for essential services the policy intent that no consumer should be worse off is not as simple as it might sound. Yet this is the promise made by governments and it is one to which they need to be held.

Issue Paper 2

Consumer Protection: Retail Codes and Contracts

Denis Nelthorpe

1. Introduction

This paper argues that retail codes are a fundamental consumer protection for domestic consumers of electricity.

Retail codes specify minimum retail standards for customers consuming less than 160MWh/year, including the rights and obligations of retailers and their customers with respect to billing and payment, customer information, complaints handling, disconnection for non-payment, contract formation and other matters.

However, this paper will argue that unfair marketing practices, breaches of the *Trade Practices Act 1974* (Cth) and various state *Fair Trading Acts*, increased billing and transfer errors are all unavoidable consequences of a contestable market and must be anticipated and addressed by increased consumer protections and regulation.

This paper draws heavily on three earlier papers produced by the Consumer Law Centre Victoria (CLCV):

- ‘Consumer Participation and Protection in the Victorian Electricity Market following Retail Contestability in the Below 160MWh per annum Tranche’, 1999;⁴¹
- ‘Electricity Retail Consumer Protections Comparison Table for NEM Jurisdictions’ November 2004 (the ‘Harmonisation Report’);⁴²
- ‘Public Consultation on a National Framework for Energy Distribution and Retail Regulation - Response by the Consumer Law Centre Victoria (CLCV)’, January 2006.⁴³

2. Current State of Play

In the current, pre-contestable market, consumer protections in Queensland are virtually non-existent and lag far behind other jurisdictions including the Australian Capital Territory and Tasmania.

⁴¹ Consumer Law Centre Victoria and Consumers’ Federation of Australia (1999).

⁴² Leigh (2004).

⁴³ Consumer Law Centre Victoria (2006).

This was highlighted in a 2004 analysis undertaken by CLCV (the ‘Harmonisation Report’). The Harmonisation Report investigated the need for, and proposed content of, a harmonized electricity retail consumer protection code in the NEM.

The report argued that a clear, comprehensive, uniform, enforceable and accessible national Consumer Protection Code is needed to underpin the national regulatory framework. Such a Code will empower consumers, building their understanding of the energy retail market. Better informed consumers, who are more confident in making decisions to take up market contracts, will unleash competition. Improved price and service offerings will result.

The Harmonisation Report included a comparison of the consumer protection framework in place in each jurisdiction. Annexure A of the report contained a comparison table of electricity retail consumer protections within the national electricity market as at November 2004. A cursory glance at that table will reveal that unlike most of the other States, Queensland does not have a comprehensive energy retail code, a regulatory safety net (a mix of regulatory protections linked to an effective concessions policy) or an independent energy ombudsman to assist vulnerable consumers.

It is arguable that the Queensland Government should have introduced a retail energy code to protect vulnerable Queensland energy consumers in the current market, regardless of the intention to introduce contestability. The introduction of FRC however makes the need acute. This is explored further in the next section.

3. The Need for Electricity Retail Codes

Since FRC was introduced in Victoria in January 2002, the Essential Services Commission (ESC) – the economic regulator - has undertaken two full investigations into its effectiveness for household and small business consumers. These investigations, in 2003 and 2004, have implications for states such as Queensland who are about to embark on FRC.

In its 2003 Issues Paper, the ESC acknowledged that there will always be a group of consumers unable to effectively participate in the competitive energy market and that this group of consumers will depend heavily on the safety net arrangements including the obligation to supply.⁴⁴

In its June 2004 FRC Final Report, the ESC of Victoria confirmed the importance of maintaining safety net provisions to ensure all household and small business customers — and in particular those in vulnerable circumstances — have access to safe, reliable, affordable and sustainable energy services. The report noted that:

In the transition to an energy market in which competition is fully effective there remains a need to maintain safety net arrangements for residential and small business customers ... This will ensure that customers who, by virtue of their location, personal circumstance or usage patterns, may be in vulnerable circumstances, can still access a fair price service offering and obtain the support of basic consumer protections.⁴⁵

⁴⁴ Essential Services Commission (Victoria) (2003), p 16.

⁴⁵ Essential Services Commission (2004b), p 4.

The alternative to an energy retail code would be to rely upon existing general consumer protection legislation such as the *Fair Trading Acts* in place in each jurisdiction and the Commonwealth *Trade Practices Act*. Such a position was advocated in a recent paper 'Public Consultation on a National Framework for Energy Distribution and Retail Regulation' (the 'Gilbert and Tobin/NERA Paper').⁴⁶

This proposition was rejected strongly by the community sector in their responses. For example, CLCV stated:

Our strong view is that the Australian energy market is far too immature to rely solely on general consumer protection legislation. As a result, we do not support the exclusion of any of the consumer protection categories in the existing Victorian regulatory consumer protection codes or guidelines, simply on the basis that they may be duplicated in general consumer protection legislation. Reliance on *Fair Trading Acts* and the *Trade Practices Act 1974* (Cth) is not sufficient for an essential service. Energy-specific regulations must be in place to address energy-specific matters, including connections, disconnection, reconnection, billing and payment, and marketing practices.⁴⁷

This view is also supported in the following assessment by the ESC in June 2004:

In the longer term, as the reach of effective energy market competition is extended to all customer groups, the Commission considers it would be appropriate to integrate the non-price energy market consumer protection arrangements into the general framework of the *Fair Trading Act 1999*, possibly by means of an enforceable code. In the meantime, the industry specific protections administered by the Commission, as amended from time to time, should be retained.⁴⁸

As noted earlier, Queensland does not have a retail energy code. The regulators in all other States and Territories have determined that such a code is essential, particularly in a contestable market. There can be no doubt that vulnerable customers will be at risk of loss of access to essential energy services unless the Queensland Government accepts the need to ensure there is an effective safety net for these customers.

The Energy Competition Committee (the body set up by the Queensland Government to oversee FRC) has come to the same conclusion. Their consultation paper on FRC policy positions proposes that specific regulations and codes be developed to protect consumers.⁴⁹ This is a very welcome development for Queensland consumers.

⁴⁶ NERA Economic Consulting and Gilbert + Tobin (2005). This paper was prepared at the instigation of the Ministerial Council on Energy Standing Committee of Officials.

⁴⁷ See n43, p 35.

⁴⁸ See n45, p 4.

⁴⁹ Energy Competition Committee (2006), p 37.

4. Consumer Contracts in a Contestable Market

Retail codes in a number of other jurisdictions also include provisions relating to the content and formation of contracts between consumers and electricity retailers. This section explains the rationale for this.

4.1. Deemed Contracts

In a pre-contestable market most domestic energy consumers are unlikely to know that a contract exists between themselves and their energy provider. This is because the contract is not in writing and is usually partly oral and partly written. State governments and/or regulators have sought to protect consumers through the imposition of deemed contracts where the terms and conditions are set out in regulations.

Whilst there are some differences between the jurisdictions, local retailers supplying to domestic and small business customers in their area are generally required to do so on terms and conditions approved by the regulator. The specific details are set out in the CLCV Harmonisation Report⁵⁰.

Again, whilst there are some differences between the jurisdictions, post contestability if a person was supplied by a franchised retailer immediately prior to contestability and has not entered into a new contract, there will be a deemed contract.

4.2. Market Contracts

In a post contestable market consumers are encouraged to shop around. This may result in a market contract with a non franchise retailer or a market contract with the franchise retailer (the incumbent). A market contract is a contract negotiated between the consumer and a retailer. Unlike a deemed or standing contract, the government/regulator does not oversee the prices charged under a market contract.

Market contracts may have a fixed term (generally between one and three years). Dual fuel contracts are a special type of market contract, where the consumer agrees to purchase gas and electricity from one retailer. Retailers must show that a consumer gave explicit informed consent prior to switching retailer or entering into a market contract.

Again, whilst there are some differences between the jurisdictions where FRC is in place, retailers must provide a copy of the contract that includes standard terms and conditions. The contract must show the total consideration or manner for calculation, all charges and refer to the right to cancel. Where the consumer has entered a market contract most jurisdictions provide a cooling off or cancellation period of 10 business days.

There have been recent suggestions, most notably in the Gilbert and Tobin/NERA Paper, that jurisdictions should rely only on fair trading and trade practices legislation for consumer protection in relation to market contracts. Community sector advocates have argued however that none of the jurisdictional energy markets can be described as effective in terms of competition (the South Australian Government resorted to paying pensioners to switch retailers) and some are yet to open

⁵⁰ See n42.

to full retail competition. This is not the time to rely on general legislation for consumer protection in energy markets.

Recent papers in Victoria and the national market consultation processes have recommended the approach of regulation of market contracts being on the basis of model terms with 'limited' consumer protection provisions. Proponents of this argument fail to understand that market contracts are often targeted at less sophisticated consumers through door-to-door sales or telemarketing — arguably the consumers most in need of strong protections.

In an emerging market for an essential service, all household consumers, regardless of whether they are on standing offer contracts or market contracts, must be afforded a full suite of protections through regulated codes, such as the Victorian Energy Retail Code and the Code of Conduct for Marketing Retail Energy. Watering down consumer protections because consumers gain the confidence to move onto a market contract is not acceptable.

These consumer protections are usually found in the energy and marketing codes in each jurisdiction and will be essential to ensure the protection of Queensland energy consumers in a contestable market.

5. Fair Trading Issues in a Competitive Market

Whilst competition is a very good thing for consumers, it is sometimes accompanied by unfair conduct by sellers.

These problems were highlighted in a 1999 report by CLCV and the Consumer's Federation of Australia prepared for the Victorian regulator in preparation for the introduction of full retail contestability in that state.

The report 'Consumer Participation and Protection in the Victorian Electricity Market following Retail Contestability in the Below 160MWh per annum Tranche'⁵¹, 1999 noted that experience both overseas and in Australia to date, suggests that the opening of the contestable market brings undesirable market practices.

For example, in the United Kingdom a 1996 survey conducted by the Consumers' Association and the Gas Consumers Council in the South West distribution area found that over 25% of those interviewed had been put off changing suppliers due to negative experiences with personal contact from sales representatives. That experience led the regulator (OFGAS) to introduce a licence condition regarding door to door and telephone sales for both existing and prospective customers.

In Australia, the introduction of competition to some parts of the telephony market provides another salient example. Telephony companies rely heavily on sales channels such as door-to-door sales and telemarketing. Both the Telecommunications Industry Ombudsman (TIO) and the Australian Competition and Consumer Commission (ACCC) have raised concerns that door-to-door sales staff have not provided cooling-off notices required by legislation in each state.⁵²

⁵¹ See n41.

⁵² See n41, p 30.

Cooling off is a fundamental consumer protection, given the possible pressures consumers can find themselves in, when confronted with such techniques.

The TIO's 2005 Annual Report provided the latest guide to consumer experiences in that competitive market. It shows dramatic increases in complaints as a result of incorrect advice at point of sale, continued telemarketing contact even though a consumer has asked to be removed from a marketing list and unauthorised transfers between suppliers.⁵³

Electricity retailers also rely heavily on door-to-door sales and telemarketing channels, which results in similar problems. In Victoria, an enforceable undertaking was obtained from energy company EnergyAustralia as result of admissions that it had engaged in misleading and deceptive conduct, and making false representations in the course of door-to-door marketing campaign in Victoria between 1 July and 10 November 2004.

The company had admitted that it had:

- made claims to consumers regarding terms and conditions that did not exist in the contract;
- advised consumers that termination fees were lower than they actually were;
- incorrectly asserted to consumers that rebates applied to individual bills;
- made sales pitches to consumers on the basis of bill payment systems that were not available; and
- refused to leave consumers' premises when asked, and/ or behaved in an overbearing manner⁵⁴

None of these reports of are all that surprising. Such behaviour is simply a by-product of a door-to-door sales and telemarketing in a fiercely competitive market. However the ongoing nature of these problems supports the conclusion of the 1999 CLCV/CFA report that recommended that:

(t)he regulator should adopt specific measures, including the facilitation of a Code of Conduct for market participants, to protect the vulnerable consumers against market failure or abuse⁵⁵.

The Victorian regulator accepted that recommendation and formed a working party of consumer, industry and government to draft the Code of Conduct for Marketing Retail Energy in Victoria.

6. Code of Conduct for Marketing of Retail Energy

The introduction to the Victorian Code states that 'the Code has been designed to protect consumers, promote the smooth introduction of full retail competition and ensure uniform minimum marketing standards'⁵⁶.

⁵³ Telecommunications Industry Ombudsman (2005), p 28.

⁵⁴ See the Consumer Affairs Victoria website at www.consumer.vic.gov.au.

⁵⁵ See n51, p 16.

⁵⁶ Essential Services Commission (2004c)

The objectives of the Code are to:

- protect consumers and promote consumer confidence in the retail electricity industry by identifying high standards of behaviour for marketing electricity;
- promote honesty, fairness and disclosure of information to consumers;
- enhance efficient retail market operation by clarifying standards and promoting certainty;
- promote ongoing cooperation between the retail electricity industry, regulatory authorities, Electricity and Water Ombudsman of Victoria and consumer representatives;
- reinforce that electricity retail contracts are made with informed customer consent;
- promote industry compliance with the Code through regular compliance monitoring and annual reporting by the Commission;
- provide for consumer and industry input into the administration and continuous improvement of the Code; and
- remain flexible and responsive to changing patterns of marketing behaviour and the changing nature of the industry.⁵⁷

It should be noted that whilst the ESC was responsible for the implementation and administration of the Code, an advisory committee using expert advice from industry and consumer representatives, was established to monitor the effectiveness of the Code and advise on issues of concern.

The ESC, taking account of community concerns and following its 2004 review of FRC, responded by re-issuing the Code of Conduct for Marketing Retail Energy in Victoria at October 2004, rather than dispensing with it.

7. Conclusions

Retail codes and effective market contracts are critical in an FRC environment.

Consumers in Queensland are entitled to expect that the introduction of FRC will be underpinned by an adequate consumer protection framework. In the absence of a national code, Queensland needs:

- a comprehensive retail energy code similar to those in Victoria and South Australia; and
- a marketing code of practice similar to those introduced in other jurisdictions.

The development of these documents should take place in consultation with industry and consumer groups in Queensland.

It will be important therefore that the support by the Energy Competition Committee to develop such instruments is actually adopted by the Queensland Government.

⁵⁷ See n56.

Issue Paper 3

The South Australian FRC experience: A Three-year search for 'The Benefits of Competition'

Andrew Nance

1. Introduction

The South Australian electricity market – made famous nationally and internationally by dramatic price rises for households in 2003 - has recently been rated as one of the three 'hottest' on the planet (along with Victoria and the United Kingdom)⁵⁸ and has recorded transfers to market contracts equivalent to 47% of the small customer base.⁵⁹ This reflects a real success story for competition and choice in a market only three years old.

However, looking underneath the headline statistics reveals a less positive reality. This paper presents a review of the first three years of FRC for electricity in South Australia, identifies some of the key issues for consideration in the context of Queensland pursuing a similar path and concludes that the real success of the South Australian market has been in creating activity and choice. Real benefits to consumers though are harder to find.

Introduction of FRC for South Australia's 750,000 small customers (660,000 households and 90,000 small businesses) meant the standard residential electricity tariff increased by nearly 25% from January 1st, 2003. This enormous step-increase in prices followed the unpopular privatisation process. An enduring community sector campaign to protect the most vulnerable households from the negative impacts of privatisation has kept the issue alive and has seen policy shifts from both government and industry.

Even though the changes were essentially locked-in prior to the election of the Rann Labor Government in 2002, health and electricity have repeatedly been the top two issues in government dissatisfaction polls by The Advertiser in the lead up to a March 2006 election. FRC in itself was not the cause of the price rise *per se*. However, what FRC did was allow for the 'final' and reasonably large re-allocation of costs from larger to smaller customers in one hit. Removal of pre-existing cross-subsidies is how it is described. This is the philosophy of 'user pays' in action.

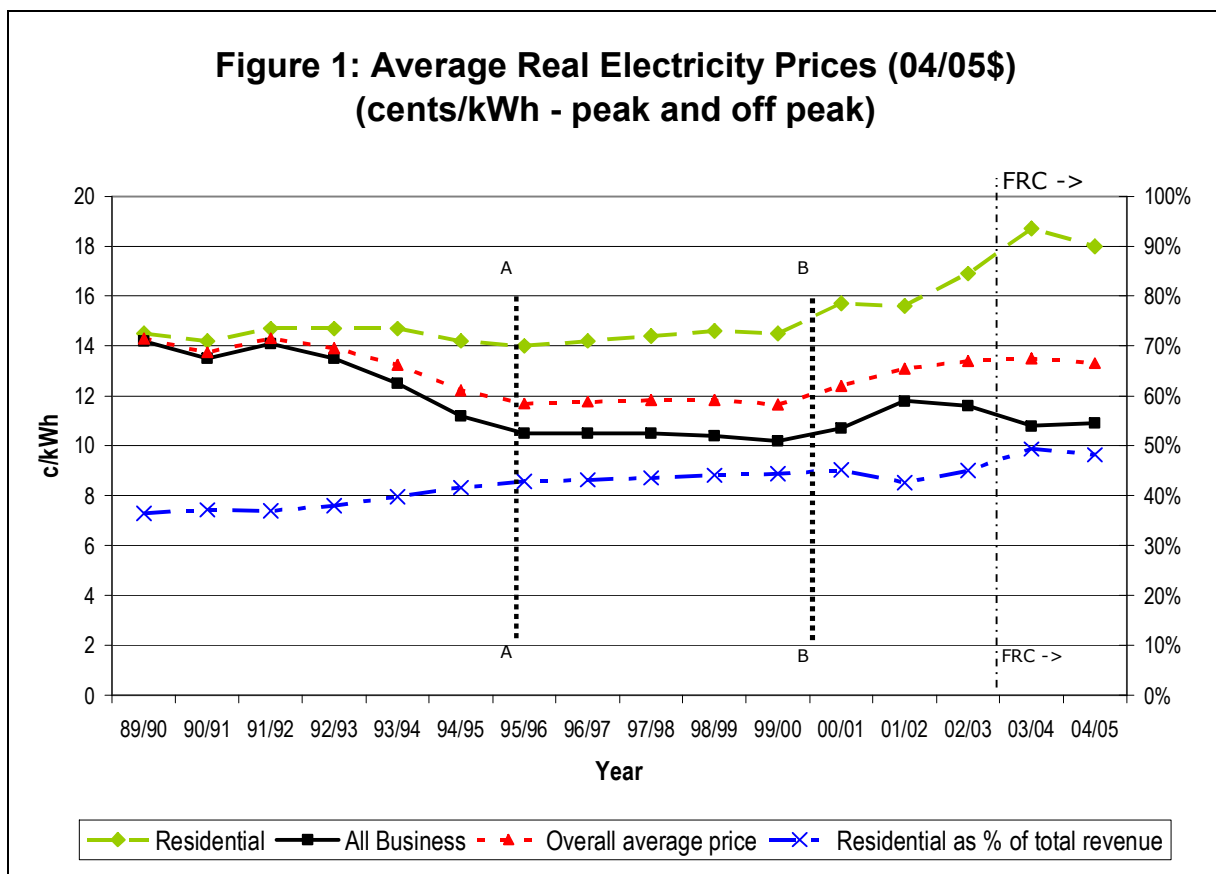
The new prices were based on what was determined necessary to cover the efficient costs of the incumbent retailer (AGL South Australia) and provide for a reasonable return for investors. Market contracts from either the incumbent or other retailers only had to be cheaper than the 'standing contract' to be competitive. Given what has become regarded by many as a generous increase at the start that essentially applied to all customers, the benefits of competition are not easily quantified.

⁵⁸ Peace Vaasaemg (2005), p 3.

⁵⁹ Essential Services Commission of South Australia, (2005c).

2. Pricing trends

Figure 1 has been taken from data published by the Essential Services Commission of SA⁶⁰ and illustrates the trends in average price (real price per unit of energy, corrected for the impacts of inflation) since the beginning of the reform process (the ‘corporatisation phase’ of the late eighties and early nineties). This chart updates one presented and discussed in 2003 by (then) Essential Services Commissioner, Lew Owens in his paper ‘Electricity Prices – The True Story’.



In reviewing the impacts of the reform process there is some danger in just focussing on price – service standards and consumer protections are issues of importance as well - but the picture painted by price trends remain interesting and relevant.

⁶⁰ Essential Services Commission of South Australia (2005b), p 32 (principally Figure 4).

As can be seen in Figure 1, the first half of the nineties shows some key trends:

- Overall efficiency of the industry shows a clear improvement – the overall cost per unit of all electricity generated and distributed falls significantly (the red line with triangles). The interconnection with Victoria was also commissioned in 1990 and was also a major contributor to reductions in average price.
- There is a clear divergence from what was essentially the same price for all customers with these efficiency gains passed on as lower costs for business. Residential prices remained quite stable.

The second half of the nineties (from A to B) proved to be relatively stable period for prices (the potential privatisation and preparations for entering the NEM no doubt caused much industry instability internally though). Any efficiency gains realised in this time were not passed through as price reductions.

The period from 'B' in Figure 1 represents the introduction of competition in the market (with the NEM trading in some form from December 1998). Contestability began with larger consumers then subsequently moved to households and small business from 2003 (FRC). A simple analysis of the drivers of the average price trends can be seen to the right of 'B' in Figure 1;

- The average price of all electricity consumed shows a clear upward trend and only in the last financial year did it show a slight reversal. However, it remains significantly above the level it was prior to the end of last century. No doubt an increasing 'peakiness' in electricity demand in South Australia is a contributor to this but it also raises doubt on the efficiency gains and economic benefits of increased competition. Providing 'choice' comes at a significant cost.
- Residential prices increased consistently since competition was introduced for larger customers but then jumped suddenly with the introduction of FRC. The proportion of industry revenue derived from residential customers has grown steadily to be now close to 50% (from approximately one-third of energy sales but around 85% of customer numbers)
- While business costs increased overall from around 2000 this increase was borne mainly by small-medium enterprises. The 'bump' may be able to be attributed to the artificial contract prices established during the privatisation phase and its associated legislation. These contracts lapsed around the time of FRC when, as can be seen, business prices again fell.

In the immediate future, the residential 'standing contract' price has been set for the next three years and the distribution charges for all customers until 2010. These will result in minor inflation linked price rises over the coming years. The ability or otherwise of retail competition to more deeply undercut the standing contract will be the key to see if any ongoing price reductions occur. One thing that can be concluded however is that the bulk of the efficiency gains from the reform process occurred prior to the introduction of competition (albeit possibly because it was looming).

3. Lessons Learned

South Australian electricity consumers have learned quite a lot over the last three years, and many of these lessons will be applicable to the Queensland market in years to come. I have outlined some of these below but it is worth acknowledging some of the differences between the markets – some will ameliorate the impacts but others may raise issues that didn't appear in South Australia.

The Queensland market is well over twice the size of the South Australian one and should generate some economies of scale that did not appear in South Australia. FRC is a very information intensive activity and each retailer requires extensive information systems to participate. Queensland should be able to benefit from systems developed in other jurisdictions.

The main reason why South Australian prices are so high compared to most other jurisdictions is not the direct costs of retailers but from the other components of retail pricing. The South Australia electricity demand is the most peaky in the NEM. Around one third of generation and network capacity is only called into service for about 5% of the year (summer air-conditioning load). The cost of this infrastructure is spread across the year through higher wholesale energy costs (the costs of generation and risk management) and higher 'network' charges (everything is sized to be capable of delivering the 'peak demand' even though it is rarely asked to do so).

The other reason is the relatively low population density of the state – relatively few customers have to share the costs of proportionately more network assets than other states.

As a result, many argue that South Australian households are simply being exposed to the true costs of supplying them with electricity where and when they want it. Others argue that this is only true to a point and that 'the pendulum has swung too far' with householders being asked to pay more than their fair share because, in the main, they tend to continue to consume regardless (even though consumption has fallen every year since prices rose to the point that the average total bill is roughly the same as it was prior to FRC). The truth is probably in somewhere in between.

Some suggestions for Queensland consumers include:

- Keep a list of the promises, expectations and predictions that appear from politicians, commentators and the industry. It will make fascinating reading in the coming years;
- Investigate what cross-subsidies exist in current electricity pricing. The 'market' will find them and remove them – this is how markets operate. The impacts can be quite dramatic but the 'pain' can be eased by managing the transition in pricing in a much better way than doing it in one hit as happened in South Australia;
- Expect a widening gap between public expectations of the role of government in the provision of this essential service and what they actually end up having the ability to influence;
- Ensure the regulatory regime maintains a clear independence from government and the industry and expect any (independent) regulator to assume the role of scapegoat when it is convenient;
- Ensure that rigorous data collection and transparent publishing occurs to ensure appropriate research, advocacy and action occurs. Essential Services Commission of South Australia (ESCOSA), the independent industry regulator in South Australia does this well;

- Ensure there are mechanisms in place to link public policy (especially social policy) with changes in the market. The ‘human services’ arms of government need to be as involved in the process as the ‘energy’ ministry. It was only when disconnection rates nearly doubled in South Australia after FRC that they have started to become involved here;
- Identify who will be the most vulnerable consumers and ensure that government concessions and retailer hardship programs reach those most in need;
- ‘Choice’ in the market is not a simple activity and is confusing for many people. Community education and ‘comparison services’ can be quite beneficial;
- A significant amount of marketing activity can be expected to occur not on price but on other ‘benefits’ - such as discounts on club membership, magazine subscriptions and other ‘cross-marketing’ initiatives;
- Comparing offers from different retailers cannot be done effectively just by looking at the ‘cents per kilo-watt hour’. Loyalty rebates, early termination fees, fixed versus variable charges and many other items will influence the number to the right of the dollar-sign at the bottom of the bill. The most common comments from householders in SA have been about the difficulty in ‘comparing apples for apples’;
- Expect different outcomes from metro versus non-metro areas. Non-metro South Australian householders and small business operators have reported (in a 2004 ESCOSA survey) being significantly less likely to be aware of the ability to choose, to have received and offer or taken out a market contract;
- Be aware of the power of ‘incumbency’. AGL, South Australia, the sole incumbent retailer in South Australia (with whom everyone started out with on January 1st 2003) retains around 85% of the small customer market – according to ESCOSA’s 2004-5 Annual Performance Report of the electricity industry. So, even though over 40% of small customers have moved to a market contract, most of those contracts are with AGL. In fact, over 95% of all customers are shared between the three biggest retailers.

And finally, be clear just what it is that FRC is meant to offer so that you can objectively judge its success. It has been extremely difficult not to form the view from the experience in South Australia that competition and choice are treated as ends in themselves and that as long as they exist, consumers are better off. The price trends presented earlier certainly do not suggest that FRC has been a success so far.

Issue Paper 4

Structure Matters: Solving Disputes between Consumers and Electricity Companies

Simon Cleary and Fiona Guthrie

1. Introduction

It is a feature of human interaction that there will be disagreements from time to time.

Where there are marketplaces, there will be disputes between parties involved in transactions. There is a range of reasons for this. Disputes might be the result of misunderstandings between parties. They might result from legitimate differences in view about the legal rights and obligations of the parties to a transaction. They might result from inadvertent errors in a supplier's system. They might be the result of deliberate attempts by one party to unfairly exploit another.

A fundamental tenet of a fair marketplace is that parties must be able to obtain a remedy where they have been wronged. This is of vital importance in the sale and supply of an essential service such as electricity. We cannot fully participate in society without access to electricity. This is why many consumers prioritise payments of electricity accounts, just behind the payment of rent/mortgages.⁶¹

Consumers in dispute with an electricity company need to be able to resolve that dispute quickly and cheaply. An effective dispute resolution process is therefore at the heart of both consumer protection and consumer confidence in the electricity marketplace.

This paper examines dispute resolution processes between consumers and electricity entities in Australia. The paper describes the current situation and asks 'what can be improved?'

2. The Current Landscape

Energy marketplaces have historically developed on a State-by-State basis in Australia. The development of dispute resolution schemes in our energy markets has followed the same State-based evolution. This has led to both similarities and differences between them, and as noted later, some are better models than others.

⁶¹ Roy Morgan Research (2002), p xvi.

2.1. Structure

As set out in Table 1, each jurisdiction has designated a specific entity to handle disputes between electricity companies and their customers.

No jurisdiction relies on the centuries-old avenue of the court system. It has been long recognised that the courts are inappropriate for resolving consumer disputes. They are too expensive, too formal, too inflexible, and take too long to satisfactorily resolve low-value individual complaints. This is magnified for consumers who cannot afford, do not have the necessary legal expertise, or do not have the time, to conduct court litigation.

The majority of jurisdictions – Victoria, New South Wales, South Australia and Western Australia – have adopted what is commonly termed an ‘industry-based External Dispute Resolution’ (EDR) model. The addendum to this paper explains how these schemes operate in more detail.

In short, EDR schemes are funded by industry, but decisions are made by an independent decision-maker: the ombudsman. The operations of the scheme - but not the investigation or outcome of complaints – are overseen by a board⁶² comprised of equal numbers of consumer and industry representatives, with an independent chair. Membership of an approved EDR scheme is mandatory, through a licence condition or regulation, for a retailer wishing to operate in these states.

The Western Australian scheme deserves special mention as it is very new, having only been established in late 2005. At present, the dispute resolution function is handled, on a contract basis, by the Western Australia State Ombudsman – known as the energy ombudsman for the purposes of the jurisdiction.⁶³

In Tasmania and the Northern Territory disputes are handled by the existing statutory ombudsman. In Tasmania however, the scheme is established by separate legislation and is funded by industry.

The Essential Services Consumer Council (ESCC) in the Australian Capital Territory is unique in both structure and function. All decisions are made by a Council appointed by the Minister. No other State has a similar structure. The ESCC has also been given the explicit function of undertaking systemic consumer advocacy, again a function that is not present in other jurisdictional schemes (although they do identify systemic issues).

Queensland is also unique in that its dispute resolution body sits within government, as part of the Department of Energy. The Department of Energy is also responsible for regulating the energy sector.

⁶² In the case of the Electricity and Water Ombudsman of New South Wales, the relevant body is a Council.

⁶³ The Energy Ombudsman (Western Australia) is in fact two separate schemes under a single governing body – the Gas Industry Ombudsman Scheme and the Electricity Ombudsman Scheme. The gas and electricity industry members fund the Ombudsman. The Board of the scheme appoints the Ombudsman, under a service agreement – at the moment this is the Western Australia State Ombudsman. The current service agreement is for a period of two years. At the end of that time the existing agreement could be extended or the governing body could appoint another person as Energy Ombudsman. That will be for the Board to decide.

Table 1 – Electricity Complaint Handling Bodies by Jurisdiction

State or Territory	FRC Status	Type of Scheme	Complaint ⁶⁴ Numbers 04/05
<i>Victoria</i> Energy and Water Ombudsman (Victoria) Limited (EWOV)	Yes – Jan 02	Industry-based EDR	9,855 enquiries ⁶⁵ 3,636 complaints ⁶⁶
<i>New South Wales</i> Energy and Water Ombudsman (NSW) Limited (EWON)	Yes – Jan 02	Industry-based EDR	8,207 matters opened ⁶⁷
<i>Queensland</i> Energy Consumer Protection Office (ECPO)	Planned - July 07	Resides within Qld Government (Department of Energy)	1,479 electricity matters received ⁶⁸ 77 gas contacts ⁶⁹
<i>Tasmania</i> Energy Ombudsman Tasmania (EOT)	Planned - 2012	Statutory Ombudsman (funded by industry)	97 enquiries 282 complaints ⁷⁰
<i>South Australia</i> Energy Industry Ombudsman (SA) Limited (EIOSA)	Yes - Jan 03	Industry-based EDR	4,265 contacts ⁷¹
<i>Western Australia</i> Energy Ombudsman (Western Australia)	No	Industry-based EDR (with the Ombudsman functions performed by the State Ombudsman)	Data not yet available as the scheme set up in September 05
<i>Australian Capital Territory</i> Essential Services Consumer Council	Yes – July 03	Statutory Council	42 complaints 1,072 hardship applications ⁷²
<i>Northern Territory</i> Ombudsman for the Northern Territory of Australia	No	Statutory Ombudsman	99 enquiries/complaints ⁷³

⁶⁴ Different schemes record and categorise complaints differently.

⁶⁵ Energy and Water Ombudsman (Victoria) (2005), p 27.

⁶⁶ See n65, p 28.

⁶⁷ Energy and Water Ombudsman (New South Wales) (2005), p14.

⁶⁸ Energy Consumer Protection Office (2005), p 8.

⁶⁹ See n68, p 10.

⁷⁰ Energy Ombudsman Tasmania (2005), p 14 (Table 2).

⁷¹ Energy Industry Ombudsman South Australia (2005), p 28. The report says that 'EIOSA received 4,798 contacts Electricity issues comprised 90.6% of the contacts'. The figure of 4,265 we have used is the proportion. Contacts includes enquires and complaints.

⁷² Essential Service Consumer Council (2005), p 7 and p 16.

⁷³ Ombudsman for the Northern Territory of Australia (2005), p 89.

2.2. Funding

Apart from the Northern Territory, all schemes are funded by industry.

Services are free for consumers.

2.3. Complaint Numbers

Table 1 also shows the number of disputes handled by each dispute resolution body as presented in their most recent annual reports.

There is no consistency in reporting between jurisdictions – some report the number of complaints and enquiries, others the number of contacts or matters. For this reason, unfortunately, it is not possible to mine this data further by adjusting the figures to say ‘number of complaints per hundred thousand customers’ (which would have adjusted for the different sizes of jurisdictions and made useful comparisons possible).

The bulk of the workload of the Essential Services Consumer Council in the Australian Capital Territory relates to consumers in financial hardship,⁷⁴ rather than complaints.

However a scheme characterises their workloads, the overall trend is for strong growth in complaint numbers year on year. By way of illustration, information for three States is as follows (bearing in mind that figures are not comparable between schemes):

- EWOV handled 8,815 electricity cases in 2002/03, increasing to 9,624 in 2003/04 and 13,491 in 2004/05;⁷⁵
- EWON noted in its most recent annual report for 2004/05 that over the ‘seven years of EWON’s operation we have seen significant growth in contacts from energy and water customers. During 2003/04 we received a sharp increase of more than 37% in complaints.’⁷⁶
- ECPO experienced a 6.5% increase between 2003/04 and 2004/05.⁷⁷

2.4. Type of Complaints

Similarly to complaint numbers, it is difficult to compare complaint types between schemes, as they do not use uniform categories. However, it is clear that the large majority of complaints relate to billing and credit issues – for example, high bills, billing errors, disconnections, difficulties in paying bills or negotiating payment arrangements. For example, for 2004/05:

⁷⁴ See Sutherland (2005), p 12. This article is a comprehensive discussion of how the Council deals with hardship.

⁷⁵ Figures are from relevant EWOV annual reports.

⁷⁶ See n67, p 4.

⁷⁷ See n68, p 5.

- EWOV - the most common electricity issue was billing (65% of issues);⁷⁸
- EWON – a total of 69% of electricity issues concerned credit or billing (45% and 24% respectively)⁷⁹. (At least 30% of all EWON matters related to impending or actual disconnection of electricity or gas.);⁸⁰
- EIOSA – 54% of issues concerned billing and credit management;⁸¹
- EOT – 41% of electricity issues concerned credit and billing;⁸²
- ECPO – 50% of contacts within jurisdiction related to accounts and disconnections.⁸³

It is not surprising therefore when reading the annual reports of most schemes, that they highlight issues surrounding disconnections and hardship in particular.

2.5. Mechanisms for Resolving Disputes

All jurisdictions require customers to have first contacted the electricity company about the matter in dispute. Once the dispute resolution body becomes involved, most use various tools, ranging from mediation and conciliation to determination. Determinations usually form the minority of cases.⁸⁴

The ESCC in the Australian Capital Territory, uses conciliation conferences and Council hearings to determine complaints.

The approach taken by the ESCC in relation to hardship cases differs to that of the other jurisdictions. Hardship complaints are dealt with by hearings conducted by a panel of two or three members⁸⁵. The Council then progressively monitors the payment record of the client.⁸⁶ In contrast, EDR and Ombudsman schemes do not conduct hearings of this nature or monitor subsequent payment arrangements.

⁷⁸ See n65, p 36.

⁷⁹ See n67, p 18.

⁸⁰ See n67, p 22.

⁸¹ See n71, p 30.

⁸² See n70, p 19 (Table headed 'Complaint Issues for 2004-05').

⁸³ See n68, p 6. Figure was calculated as follows: (account + disconnections) divided by (account + damages + disconnections + enquiries + equipment + extension + interruption + vegetation)

⁸⁴ For example, EWOV made no binding decisions in 2004-05 (See n65, p 28). EWON noted that 'During the first five years of the EWON's operations, the ombudsman was required to make only two binding decisions to resolve complaints. This year there were twelve'. (See n67, p14) Note this is still a minute figure as a percentage of overall resolutions.

⁸⁵ See n72, p 3.

⁸⁶ See n72, p 13. If payments are being made, the client is not called back for review until three or six months after the first hearing. This date for review is set at the initial hearing. If payments are not being made, or there is a significant change in consumption, the client is called in for review in advance of the pre-set review date?.

Both the ESCC and the EDR schemes can order that supply be maintained for a consumer or that the consumer be reconnected, once the matter comes to the schemes. This is an important consumer protection. As a matter of course, the ESCC and EWON will always order reconnection in cases where a consumer comes to them, after being unable to resolve their matter with the electricity retailer. EWON deals with disconnection cases as a priority and is generally able to negotiate immediate reconnection for customers.

Queensland's ECPO outsources all determinations and engages independent arbitrators for any dispute unable to be resolved through mediation. All other dispute resolution bodies provide a 'one-stop' shop service.

In all jurisdictions except the Australian Capital Territory, decisions are binding on the electricity company, but not consumers. This is consistent with the philosophy underpinning Ombudsman schemes, as alternatives to the courts. Consumers who are unhappy with a decision however, have the option of taking their matter to any other avenue of redress, such as a small claims court, or an arbitrator as a fresh application.

In the Australian Capital Territory the situation is slightly different, with consumers who choose to access the ESCC rather than the courts initially, having the right to appeal a decision to the Australian Capital Territory Supreme Court. There have been no instances of this to date.

2.6. Accountability

Each jurisdictional body publishes some form of annual report. Some schemes also publish regular newsletters or bulletins.

The annual reports of both the New South Wales and Victorian schemes, which have been in place the longest, are comprehensive. The Queensland scheme in contrast, although set up in 2000, only published its first annual performance report some three years later in 2003-04.

Industry-based EDR schemes are directly accountable to their boards, made up of industry and consumer representatives. Statutory schemes are accountable to their respective Parliaments.

A number of the schemes undertake regular customer surveys⁸⁷, stakeholder consultations, as well as reviews of scheme operations. For example, EIOSA's

'(c)onstitution requires that a review of the Scheme be conducted by the end of the 2005-06 year ... The outcomes of the review will be reported in the next annual report.'⁸⁸

⁸⁷ For example, EWON completed a customer surveys in 2004/05 and 2002/03. EWON completed a customer survey in 2003/04. ECPO undertakes an independent client satisfaction survey on an annual basis. Surveys have been completed every year since 2002-03.

⁸⁸ See n71, p 12 (Chairman's Report).

3. The Impact of Full Retail Contestability

FRC opens up the electricity market to competition, and provides residential customers with the opportunity to choose between electricity retailers. As the marketplace changes with FRC, there are consequent changes in both the nature and number of consumer complaints.

3.1. Nature of Complaints

New categories of dispute arise within an FRC environment including problems with customer transfers, retailer marketing practices and the provision of information.

For example, Energy Australia recently admitted that its door to door sales practices in Victoria had breached several provisions of that State's *Fair Trading Act*.⁸⁹ The Victorian Minister for Consumer Affairs said that:

Consumer Affairs Victoria received complaints from consumers that Energy Australia's door-to-door marketers made claims about terms and conditions that did not exist in the company's contracts.

Some door knockers even made claims that they were government representatives and in some cases refused to leave the customers' homes.⁹⁰

The Energy Industry Ombudsman of South Australia reported new categories of cases after the introduction of FRC in that state and increases in complaint numbers relating to competition.⁹¹ In particular it identified major issues including difficulty comparing contracts, consumer information and market conduct.⁹²

3.2. Number of Complaints

The number of complaints handled by dispute resolution bodies will clearly increase in an FRC environment, but by how much?

The evidence from the States with FRC already – Victoria, New South Wales and South Australia – is that there is a moderate increase that builds over time.

For example, electricity FRC was introduced to both Victoria and New South Wales in January 2002, the first states to do so.

⁸⁹ Energy Australia signed a court enforceable undertaking to offer redress to identified consumers in a form agreed with the Director of Consumer Affairs; to conduct compliance programs and product training as agreed with the Director of Consumer Affairs; to review training and/or materials used; to adhere to and enforce the terms of contracts with its independent contractors; to introduce additional payment methods for consumers; and to strengthen and improve its internal dispute resolution processes.

⁹⁰ Hon Marsha Thompson, Minister for Consumer Affairs (2005), 'Energy Australia Agrees to Better Protect Consumers', Media Release, 13th March 2005.

⁹¹ Energy Industry Ombudsman South Australia (2004), p 22.

⁹² See n91, p 10.

EWON reported that energy competition issues accounted for 6.1% of issues raised by customers in 2003/04 and 8% of issues in 2004/05.⁹³

EWOV reported that in the first half of 2002, it received a 'relatively small' number of electricity FRC cases – 252 (7% of all of its electricity cases for that period).⁹⁴ By the first half of 2003, electricity cases were up to 674.⁹⁵

3.3. Implications

There are obvious implications here for the States yet to introduce FRC – Queensland and Tasmania. They can expect increases in the number, type and complexity of disputes.

Although the main issues raised by customers will almost certainly continue to centre on billing and credit (see Section 2.4), FRC will have an impact.

4. What is the Best Model Operating Now?

Depending on where a consumer lives, they might find themselves taking a dispute with an electricity entity to an industry-based EDR scheme, a statutory ombudsman, a statutory council or a government department. Does it matter that dispute resolution bodies are structured so differently across Australia?

In our view it does, particularly within the overlay of FRC.

Whilst each structure has its pros and cons, overall the industry-based EDR schemes are likely to be better funded, better resourced and more consumer-focussed in the long run than any of the other structures currently in place.

There are a number of reasons for this conclusion, set out below in relation to the structures in place across Australia.

4.1. Statutory Ombudsman (Tasmania and Northern Territory)

Statutory ombudsman schemes are independent in their decision-making, but have a number of drawbacks, particularly in comparison to industry-based EDR schemes.

First, statutory ombudsman are not as flexible as industry-based EDR schemes. It is far easier to amend the Terms of Reference of an industry-based EDR scheme to say expand its jurisdiction, than it is to amend the legislative instrument underpinning a statutory ombudsman.

Second, statutory ombudsman are essentially reactive. They tend to play a minimal role in identifying systemic issues or garnering changes to industry practice, other than through their annual reports to Parliament.

⁹³ See n91, p 9 and n71, p 18 respectively.

⁹⁴ Energy and Water Ombudsman (Victoria), 2002.

⁹⁵ Energy and Water Ombudsman (Victoria), 2003.

Industry-based EDR schemes on the other hand go to great lengths to involve stakeholders as part of a proactive approach. Such involvement highlights emerging issues and can lead to improved industry practices. Examples include consultative committees such as the EWOV Case Handling Advisory Committee made up of community, industry and academic representatives, regular newsletters and stakeholder workshops on emerging or problematic issues.

Having made these points however, it does make sense for a small jurisdiction without FRC, such as the Northern Territory, to rely on their existing statutory ombudsman. With relatively few complaints and with only one government-owned provider of electricity, it is far more cost-efficient to address disputes through the existing statutory ombudsman.

4.2. Government Department (Queensland)

The major drawback of the current Queensland scheme is its location in a Government department. This fatally compromises the organisation's independence and accountability and this flows through to all aspects of its operation.

The Energy Consumer Protection Office is ultimately responsible to the Minister for Energy – the same Minister is also the shareholder in the electricity retailers, Energex and Ergon, and regulates their activities. This may make it more difficult for ECPO to convince the community that it is adequately highlighting and dealing with systemic issues.

The difficulty in relation to independence in actual decision-making was recognised by an internal Government review of ECPO in 2001. To overcome the inherent conflict - Government bureaucrats involved in decisions about disputes between consumers and Government owned corporations - the determination process was outsourced to mediators and arbitrators⁹⁶ around the State instead. Whilst ostensibly reducing this source of conflict, this creates problems in relation to the effectiveness and efficiency of the scheme.

It is unclear for example how consistency of decision-making is maintained, whether the outsourced mediators and arbitrators share case outcomes and keep up to date with developments in utility regulation or the industry generally, whether the process is cost-effective and consumer friendly⁹⁷ and how systemic issues could be identified.

ECPO, given its mandate is set down in legislation, will also be more inflexible. Changes to its jurisdiction need to go to Parliament, a time-consuming process. As well, unlike the industry-based EDR schemes, there is no board able to monitor the performance of the organisation and drive improvements in a transparent and accountable way.

The problem of independence has been recognised by the Energy Competition Committee, a three-person independent panel appointed by the Queensland Minister for Energy to oversee the

⁹⁶ Arbitrators have statutory powers to make binding decisions of up to \$20,000 against entities and to direct rectification.

⁹⁷ For example, consumers rejecting a determination for example are placed in the unusual position of having to take on the administrative responsibility for not only notifying the arbitrator of their decision, but also ECPO and the energy company.

implementation of FRC. The Committee's proposed policy position, released in March 2006, is that 'ECPO be established as an independent corporation outside government'.⁹⁸

If this policy proposal is accepted by the Queensland Government, the whole nature of complaint handling in Queensland would change. The most probable structure would be that of an industry-based EDR scheme (outlined in section 4.4).

4.3. Statutory Council (Australian Capital Territory)

Looked at in isolation, the three main functions of the Australian Capital Territory's ESCC – dispute resolution, systemic consumer advocacy and handling of hardship cases – are undeniably important. Arguably however, there is the potential for conflict when all functions are undertaken by the same organisation. For this reason, the Australian Capital Territory model as a whole would not be appropriate for other jurisdictions.

The role of a dispute resolution body is to act as the 'umpire'. Such a body should not, and cannot take sides. This is why sitting dispute resolution and systemic consumer advocacy together may create conflicts. Having said this however there is a glaring need for consumer advocacy across the National Electricity Market – the issue is setting up the best structure for it.⁹⁹

However, the way in which hardship is dealt with in the Australian Capital Territory has merit. The ESCC consistently uses its power to order a retailer to maintain supply to a customer or to reconnect them, whilst their hardship matter is heard. A panel from the Council will then meet with the consumer and usually sets a payment plan. Progress against the plan is then monitored. The Council also has the power to require a retailer to write off some or all of the debt (the retailer is reimbursed by the Australian Capital Territory government as a Community Service Obligation).

4.4. Industry-Based EDR (Victoria, New South Wales, South Australia and Western Australia)

Industry-based EDR schemes are widely seen as highly effective, not just in the electricity marketplace, but also in a range of other industry sectors - banking,¹⁰⁰ insurance,¹⁰¹ telecommunications,¹⁰² and financial planning and stockbroking¹⁰³ - to name just a few. Peter Kell, the CEO of the Australian Consumers' Association for example has said that:

One of the things that we can sometimes overlook is making sure that we undertake a careful assessment of the successful aspects of consumer protection. There is a tendency,

⁹⁸ See n49, p 30.

⁹⁹ The proposal at the time of writing this article was for the NECA Advocacy Panel to be re-structured. The consumer movement welcomed the planned focus of the new body on small end-users, but is disappointed that the body will be reactive, with no advocacy focus (despite the Panel's name, the role envisaged continues to focus only on grant-making to other organizations).

¹⁰⁰ The Banking and Financial Services Ombudsman set up in 1990.

¹⁰¹ The Insurance Ombudsman Service was set up in 1993 (then called Insurance Enquiries and Complaints Ltd).

¹⁰² The Telecommunications Industry Ombudsman was set up in 1993.

¹⁰³ The Financial Industry Complaints Service was set up in 1999 (previous to this it was known as the Life Insurance Complaints Scheme).

because we are always looking for improvements, because we are always analysing current problems, to overlook some of the successes.

An example of a success is the establishment of a range of consumer dispute resolution schemes in Australia ... (We need to make sure) that there is no attempt to wind back some of those gains.¹⁰⁴

Greg Tanzer, the Executive Director of Consumer Protection in the Australian Securities and Investments Commission (ASIC) said, albeit within the context of financial services, that:

ASIC's further view is that the availability of a free, independent and effective forum for resolving consumer dispute is what marks out 'professional' industries from 'selling' industries.¹⁰⁵

The benefits of industry-based EDR for consumers are many. They are independent and seen to be so, accessible to consumers, flexible and responsive to change. The track record of the established EDR schemes – those in Victoria and New South Wales are impressive. This is presumably why the governments of South Australia and Western Australia introduced the same models.

There are potential downsides to industry-based EDR schemes however. One of these will be the ever-present danger of industry capture of the scheme, aided by a compliant community sector. There are a couple of ways this can be avoided and schemes will need to be vigilant in this regard:

- the personal integrity of the ombudsman must be of the highest order;
- industry-based schemes should be subject to a regular external and independent review, say every five years. In the case of industry-based EDR schemes in the financial services sector, such reviews are required by the ASIC as a condition of scheme approval;
- the community sector needs to monitor how these schemes perform, based on the experience of caseworkers and by comparing the performance of schemes in different states and sectors.

4.5. Conclusion

Of the four different models discussed in this section, the industry-based EDR schemes are to be preferred in larger jurisdictions.

5. Future

Planned changes to the regulatory framework for gas and electricity are making the marketplace more truly national. For example, the Australian Energy Regulator will eventually have

¹⁰⁴ Kell (2005).

¹⁰⁵ Speech to the Investment and Financial Services Association, 2005.

responsibility for all distribution pricing. In a national market, should there also be a national Energy Ombudsman?

There has been discussion about such a possibility in recent years. From a business perspective, it might make sense to deal only with one ombudsman rather than a myriad of different schemes. There are possible economies of scale and scope. On the other hand, there is much to be said for consumers being able to contact a local ombudsman in their own State, who in turn has close ties with the community and understands the local situation. Ultimately the question comes back to one of structure – again! One option would be one national ombudsman based in one State. Another option might be for a national ombudsman but with offices in each State. There are probably other variations.

In the medium term however, dispute resolution appears likely to remain a jurisdictional responsibility. A recent discussion paper prepared for the Ministerial Council on Energy said that:

A common feature of the existing Jurisdictional consumer protection regimes is that retailers are obliged to have internal dispute resolution/record keeping procedures and participate in independent alternative dispute resolution (ADR) schemes. ... ADR schemes are most important for the most vulnerable of end-customers. Vulnerable end-customers are likely to benefit from any default tariff regimes, Community Service Obligation regimes and other Jurisdictional Government policies. Consequently, effective ADR schemes are likely to be jurisdictionally based.¹⁰⁶

If jurisdictional dispute resolution is here to remain, at least in the medium term, it makes it all the more important that we get it right. Two things need to happen.

First, it is important that the existing State-based schemes communicate and cooperate to ensure high standards are maintained. Customers in dispute with company x should expect the same outcome regardless of the State in which they live. All of the schemes should be looking to harmonise their processes, such as they way they count and categorise contacts and complaints, as well as their terms of reference/jurisdiction for this reason.

The ongoing dialogue facilitated through the Australia and New Zealand Energy and Water Ombudsman Network (ANZWON) is therefore vital. We note however that Queensland (ECPO as presently structured) and the Australian Capital Territory are unable to join ANZEWO. Neither scheme completely meets the criteria for industry-based EDR schemes on which membership is based.

Second, Queensland in 2007 and Tasmania in 2012, will be introducing FRC. Queensland's possible move to replace their present scheme with one that is independent of government is a welcome move. Both governments will need to ensure that whatever structure their dispute resolution body takes, it is adequately resourced and prepared for dealing with the new challenges that FRC will impose.¹⁰⁷

¹⁰⁶ See n46, p 62. ADR can be used interchangeably with EDR. The latter term has become more common recently.

¹⁰⁷ For further discussion on EDR see Appendix 1.

Issue Paper 5

Financial Hardship and the Social Responsibility of Energy Retailers

Elissa Freeman

1. Introduction

This paper explores the obligations on energy retailers to provide assistance to households in short term financial hardship and at risk of being disconnected from essential energy supplies. Australian communities have demonstrated the social and political will to ensure that households who find themselves unable to pay a bill do not suffer further economic and social disadvantage through utility disconnection. When New South Wales, for example, recently experienced a 25% increase in disconnections, the Minister for Utilities voiced his concern that ‘many of the people who have had their power cut off live in disadvantaged areas... we need to give them more consideration and provide easier ways to pay their bills’.¹⁰⁸ Energy retailers play a critical role in managing the utility debts of customers in hardship.

Some members of our community will find themselves at greater risk of hardship throughout the various cycles of a fully competitive retail energy market. The design of policy instruments can influence which customers are sheltered from significant hardship and which are exposed to utility disconnection. Retail competition does not limit the opportunities available to energy retailers to actively assist households experiencing financial hardship. Various jurisdictions have demonstrated the ways in which licences, legislation, community service obligations and even price regulation can be designed to promote the social responsibility of energy retailers to manage utility debts and implement disconnection processes reasonably with consideration of a household’s capacity to pay.

2. What is Hardship?

Securing universal access to electricity is a primary concern for policy makers. However, this goal is challenged when households find themselves in financial hardship and temporarily unable to afford electricity. The following case study provides an example of how hardship can emerge in our community:

Lucy is a single mother with seven-year-old twins, a 13-year-old and a 17-year-old. Two of her children have ‘a medical condition’. She rents privately in an outer Sydney suburb. Lucy had recently moved into the house where the [electricity] disconnection occurred and had incurred the costs of moving. She was still paying off bills from the family’s previous home and getting further and further behind as she could only afford to pay small amounts...

¹⁰⁸ Carl Scully MP, (2005) ‘More help for struggling families to pay power bills’, Media Release, 20th September 2005.

About four weeks after moving she received an electricity bill at the new house and was disconnected about a month later... Parenting and Carers payments are the sole sources of income for Lucy and her children.¹⁰⁹

Experiences like Lucy's have been documented across many Australian jurisdictions. The case study illustrates a typical incidence of financial hardship, where a temporary change in circumstances exposes the household to unaffordable debts, culminating in the household's disconnection from electricity supply. In this case, the disconnection was only for a short period of time but with financial, social and health consequences for the members of the household. For households like Lucy's the problem is not a willingness to pay but rather the capacity to pay on the standard terms required by an energy retailer.

Electricity is a derived demand good because its usefulness stems from the consumption of goods and services it enables. For example, a household will purchase electricity in order to immediately run a refrigerator, power lights and cooking facilities. Cutting off a household's electricity supply does not in itself constitute a socially unacceptable situation. Rather it is the inability to cook, wash, stay healthy and to care for children, the elderly and disabled which presents the real problem.

Hardship is not limited to households who face disconnection. It is also present in households who seek to maintain access to energy services by under-consuming energy, diverting spending from other essential needs or allowing significant utility debts to accumulate. The introduction of full retail competition (FRC) for small end-users (and households specifically) does not eliminate the extent of short term hardship experiences such as the one described above – they are often lifecycle-related or associated with unanticipated events such as the loss of employment, accident or illness.¹¹⁰

Where energy utilities are granted the power to disconnect household supply, and therefore deprive households of an acceptable standard of living, policies need to be in place to ensure that these powers are not improperly used. Lucy's experience suggests that this goal has not yet been achieved.

3. Trends in Hardship

The experience of jurisdictions across Australia has demonstrated that the introduction of market dynamics in a retail electricity market can lead to the heightened marginalisation of households at risk of disconnection.

¹⁰⁹ See n23 at pp 38 – 39.

¹¹⁰ Rich and Mauseth (2004).

The advent of FRC has been accompanied by pressure to inflate retail prices to encourage market entry by new firms. This is known as headroom pricing. For households on low and fixed incomes, small increases in essential services prices can significantly reduce household disposable income and increase their susceptibility to utility debt and financial hardship. This was especially notable in the case of South Australia where FRC was accompanied by 25% increases in the cost of electricity. The Western Region Energy Action Group (WREAG) report into the impact of the price shock highlights the particular vulnerability of low-income households. The report showed average utility debts escalating by 77% across the 12 case-study low-income households over the price shock period.¹¹¹

As well as managing higher bills, low-income consumers can be excluded from the price-benefits of the competitive market. Second tier retailers seek out high-consumption, high-income households, for their price-competitive offers, often actively excluding other classes of consumers. Research undertaken in New South Wales suggests that competitive contracts/offers are focussed on end-users with consumption between 10-20MWh, well above standard household consumption.¹¹² Higher discretionary electricity consumption is generally associated with higher income levels, which suggests that the price-benefits of competitive market contracts are targeted to higher income (and thus more profitable) households.¹¹³ While offering an economic choice to some households, FRC inevitably sees some households experiencing greater levels of economic exclusion.

In the period since FRC was introduced in 2001, the level of residential disconnections for non-payment in New South Wales has fluctuated and has recently climbed to a very high level. By comparison, until recent legislative changes, Victorian disconnections have been less volatile but still steadily increasing since 1999.¹¹⁴ While disconnection rates are neither the only measure of hardship, nor a necessarily good measure, the figures suggest that hardship cases occur at the same rate as prior to the introduction of FRC, if not at a higher rate.

4. The Social Responsibility of Energy Retailers

Corporate social responsibility (CSR) is commonly understood as ‘the voluntary actions that business can take, over and above compliance with minimum legal requirements, to address both its own competitive interests and the interests of wider society’.¹¹⁵ Like all firms, energy retailers have the capacity, should they seek to employ it, to look beyond a standard profit maximisation goal and have regard for the community in which they operate.

¹¹¹ Western Region Energy Action Group (2004).

¹¹² PricewaterhouseCoopers (2004).

¹¹³ Independent Pricing and Regulatory Tribunal of New South Wales (2004).

¹¹⁴ See n110.

¹¹⁵ Department of Trade and Industry (2004) ‘What is CSR?’ <http://www.societyandbusiness.gov.uk/whatiscsr.shtml>.

Statutory arrangements across Australia allow energy utilities in certain circumstances to cut off supply of an essential service where contractual payment arrangements are not met. Consequently, when and how energy retailers seek to exhibit a sense of social responsibility can have big ramifications for customers in hardship.

Given these high stakes, some jurisdictions have sought to more actively ensure that social responsibility on the part of retailers is present or in an appropriate form. The New South Wales *State Owned Corporations Act* 1989 formalises this requirement on the incumbent State-owned electricity businesses. Under the Act, one of the objectives of a State-owned corporations is to ‘to exhibit a sense of social responsibility by having regard to the interests of the community in which it operates’ (s8(1)(b)). Other regulated objectives include consideration of the environment and sustainability. These businesses should be setting an example about how to both operate profitably and with a sense of social responsibility.

Yet even with this requirement on the State Owned Corporation (SOC), the business still is faced with the heavy burden of conflicting obligations to shareholders, the competitive environment and social obligations. This leaves little confidence that social issues will be comprehensively addressed or that consumers in hardship will be protected from utility disconnection.

Other regulatory mechanisms can be employed to formalise social equity concerns, such as through licence conditions and price regulation. The Office of Gas and Electricity Markets (OFGEM), the regulator in the United Kingdom, for example, has a statutory obligation to have regard to the interests of customers who are disabled, chronically sick, of pensionable age, on low incomes or living in rural areas.¹¹⁶ OFGEM formalises this obligation through a Social Action Plan, which, amongst other areas, includes a specific commitment to actively address energy efficiency for low income households and seeks to shame the less active companies into making a greater effort to meet their social obligations. The benefit of such an approach is the greater promotion of innovative CSR in the sector, as well as bringing together various stakeholders to address complex fuel poverty issues. OFGEM’s research has confirmed that energy retailers in the United Kingdom achieve competitive advantages in terms of brand positioning through the development of CSR programs.¹¹⁷

The distinction between temporary and chronic hardship is an important one for retailers. The Energy Retailers Association of Australia (ERAA) generally considers that temporary hardship can be addressed in a shared-responsibility arrangement with a retailer-specific hardship policy.¹¹⁸ The experience in New South Wales of retailer-specific hardship programs has been mixed. As the three incumbent State-owned retailers have each introduced their own version of hardship programs, the outcome in terms of disconnections alone has been widely different. In one instance, the number of residential disconnections for non-payment actually significantly

¹¹⁶ Office of Gas and Electricity Market (2005) ‘Social Action Strategy’
http://www.ofgem.gov.uk/temp/ofgem/cache/cmsattach/12605_222_05.pdf?wtfrom=/ofgem/work/index.jsp&ndaction=/areasofwork/socialactionplan.

¹¹⁷ See n116, 3.10.

¹¹⁸ Energy Retailers Association of Australia (2005).

increased.¹¹⁹ Yet, at the same time a different retailer was able to slash their disconnections after the introduction of their hardship program. As such, the ultimate goal of reducing the incidence and severity of hardship through retailer hardship programs has, to date, not been consistent in New South Wales.

Both New South Wales and Victoria have recently reconsidered the obligations on retailers to provide assistance to customers in financial hardship.

In 2004 the Victorian parliament endorsed a swathe of provisions aimed at extending the consumer protections in the State. One of the new provisions was an obligation on retailers to make ‘wrongful disconnection’ payments. The law complements the existing retail code and forces retailers to be accountable for situations whereby a customer who is found to be in hardship is disconnected from their energy supply.

The New South Wales Government is also in the process of considering amendments to retailer licence obligations to improve the payment options available to customers in hardship and at risk of disconnection.

These developments come after a number of years of FRC in both jurisdictions and highlight the importance of the political will to address hardship as an ongoing priority, as well as the need for prescriptive retailer obligations.

5. Competing to Assist

In Australia, energy retail businesses more commonly look to a shared responsibility between themselves, government and the community to address issues of affordability and access to energy services. The Public Interest Advocacy Centre (PIAC) has observed that the political will to assist and protect households in hardship is fundamental to ensure that protections and statutory obligation on retailers develop at the same rate as the competitive market matures. Statutory obligations must develop around the principle that energy retailers have an obligation to manage debt and avoid disconnecting customers in hardship.

The benefits of competition in the energy market are not evenly distributed. Trends in hardship suggest that vulnerable customers continue to experience a degree of economic exclusion in the competitive market and rely on a range of policy measures to ensure affordable access to essential energy supplies. In New South Wales, the lack of uniformity in hardship programs among retailers means that the experience of households in hardship varies greatly.

The experience in New South Wales has been that unregulated and unenforceable retailer hardship plans or corporate social responsibility requirements cannot be relied on to address the needs of vulnerable customers. While some energy retailers in New South Wales and other jurisdictions in Australia and overseas have demonstrated their capacity to make significant headway on hardship,

¹¹⁹ Unpublished Independent Pricing and Regulatory Tribunal data.

robust regulations continue to be critical to the delivery of affordable access to energy. PIAC has continued to lobby for improved statutory protections, with prescriptive obligations on retailers to assist customers in temporary hardship and at risk of disconnection.

As outlined above, it is not possible to rely on unregulated and unenforceable CSR requirements on energy retailers. The framework of shared responsibility relies on energy retailers having statutory obligations to provide bill assistance and hardship programs for customers in hardship. The Victorian and New South Wales Governments have, or are currently in the process of, tightening these requirements in response to concerns about growing debt and disconnections among disadvantaged households. It is concerning that these provisions have not been incorporated into Queensland's proposed policy framework for FRC. Given that the experience of financial hardship persists throughout the cycle of FRC, the Queensland Government would be well placed to include statutory obligations on energy retailers to manage customer's debts, preferably through a licence condition and subject to effective regulatory oversight.

Issue Paper 6

‘Chronic’ Hardship Customers and Government Responsibility

May Mauseth Johnston

1. Essential Services and Financial Hardship

In a contestable market for essential services, both the government and competing companies play an important role in ensuring that customers in financial hardship can access and afford services such as gas and electricity.

Some energy retail companies oppose regulation requiring them to assist customers experiencing financial hardship. They claim that it is the role of government to address poverty and income levels. This is a very narrow view as it connects affordability of services to income levels only. While we would agree that it is the role of government (and certainly not energy companies) to address inadequate income levels in general, energy affordability also relates to consumption levels, flexible payment options and the price of energy. The supply side can play various roles in promoting affordability for customers experiencing financial hardship in these areas.¹²⁰

This paper argues that government has a role to play in ensuring that the community can afford essential services and discusses some of the options government has in terms of assistance programs (which can be distinguished from other policy instruments such as the regulation of prices and standards). Drawing on the Victorian experience, it outlines some of the programs in place and discusses their impact on energy affordability levels. This assessment should provide the Queensland Government with valuable insight into what constitutes good policy in terms of developing Community Service Obligations and other customer assistance programs with a preventative and long term effect on consumers’ energy affordability levels.

2. The Role of Government

There are various factors influencing energy affordability for consumers. These include the consumer’s discretionary income, the price for the delivery of energy and the consumption level of the consumer (including higher consumption due to energy inefficiency). Government has a number of options available to address each of these factors as part of a social policy response. Firstly, they can increase the discretionary income level of consumers through grants. Secondly, they can reduce the cost of energy by applying concessions to a set percentage of a bill. Finally, they can assist consumers in making energy efficiency improvements to reduce consumption levels through retro-fitting programs.

¹²⁰ Companies can for example offer affordable instalment plans, flexible payment options and energy efficiency advice.

A useful distinction to make when assigning responsibilities to address energy affordability is to differentiate between consumers in chronic financial hardship and those experiencing temporary financial hardship. Temporary financial hardship might arise for example from unemployment. People experiencing chronic financial hardship require ongoing support and are likely to know how to access relevant government or community programs. Those people in temporary financial hardship may be experiencing this situation for the first time. In such cases, these consumers may be unaware of assistance schemes and would rely on their energy retailer providing information and flexible payment options when payment difficulties occur.¹²¹

2.1. Chronic Hardship Measures

For low-income households experiencing on-going financial hardship some government measures are more effective in improving affordability than others. Substantial work has been undertaken to understand the characteristics of the ‘chronic poor’ and how their needs are different from consumers in temporary financial hardship or other domestic energy consumers.

It is, however, crucial to recognise that it is impossible to identify a complete suite of criteria to determine which customers will need assistance before the fact. Consumers move in and out of financial hardship and while some factors correlate more strongly with energy related financial hardship than others, there are numerous causes of hardship. This is an important point to recognise when developing safety-nets for vulnerable consumers.

The Committee for Melbourne Debt Spiral Study examined the relationship between people reporting utility stress and indicators such as income levels, labour force status, household type, number of dependent children and housing tenure. Unsurprisingly, the experience of utility stress strongly correlates with low income, not being in the work force, sole parent households, larger households (four members and more) and living in private or public rental properties.¹²²

The eligibility criteria for government assistance through the Department of Human Services (DHS) in Victoria is the Commonwealth Government’s income based assessment. Victorian consumers able to access DHS assistance are thus unemployed, on parent/carer benefits, pensioners or low income earners. A survey commissioned by the DHS Concession Unit in 2001 found that 86% of concession households derived their income from pensions and other government benefits.¹²³ Put simply, this means that the Victorian State Government acknowledges that the Commonwealth Government’s pensions and benefits are insufficient to meet the cost of essential services. This in itself illustrates why it is clearly the responsibility of government to develop and provide assistance programs to ensure energy affordability.

A joint research report by the Consumer Utilities Advocacy Centre (CUAC) and the Consumer Law Centre Victoria examined measures to address energy affordability along a ‘timing’ dimension. The report explained:

¹²¹ See Issue Paper 5 by Elissa Freeman above for a detailed discussion on financial hardship and the role of energy retailers.

¹²² Committee for Melbourne (2004), Ch 3.

¹²³ Department of Human Services (2001), p 32.

By ‘timing’, we mean the stage within the general cycle of consumption, billing and possible disconnection at which the measure intervenes or applies. This dimension relates to the issue of affordability. Programs with preventative aims, such as concessions and energy efficiency initiatives, are characterised by early intervention in that they aim to provide assistance before a household finds itself with difficulties paying a bill. At the other end of the scale are measures that aim to assist consumers who are already experiencing acute affordability or disconnection problems. Examples of such measures are Utility Relief Grants (URGs) and debt waivers.¹²⁴

The report argued that it is the responsibility of government to ensure that energy is affordable to all consumers, and that while energy companies should be obliged to assist customers unable to pay their bills through mandatory Hardship Policies, government cannot step away from this task due to the severe impact of disconnection – the ultimate consequence of non-payment.

3. The Victorian Government’s Approach

3.1. Concessions

A significant measure to improve energy affordability by the Victorian Government is the Winter Energy Concession. For electricity alone approximately 674,000 low-income Victorian households received State concessions in 2003-04. The concession scheme allows eligible customers to receive a 17.5% reduction in two winter electricity bills (issued between mid-May and mid-November) per year. Recipients in this year had their electricity bills reduced by an average of \$67. The winter energy concession also includes a 17.5% reduction in three winter gas bills for consumers connected to the natural gas network. The average recipient received a \$69 reduction in their winter gas bills in 2003-04.

The DHS Concessions Unit, which administers the energy concession and the Utility Relief Grant schemes, stated in their annual report that the Winter Energy Concession expenditure increased by 9% in 2003-04 compared to the previous year. The Unit attributes this increase to a rise in domestic energy tariffs and residential consumption. The concessions claimed on winter energy bills cost DHS over \$84.5 million in 2003-04. In addition to the concessions, DHS paid the energy retailers administration fees worth over \$2 million for their assistance in the process.

3.2. Relief Grants

In addition to the energy concessions the Victorian Government offers assistance to consumers unable to pay their energy bills. The main program is the URG with its objective to assist consumers in temporary financial crisis. However, it is widely accepted that the URG scheme is also a critical component of the total assistance package available to households in on-going long-term financial hardship. Although the URG scheme is described as a once-off payment, assistance is given on more regular intervals as consumers experience on-going payment difficulties. We support this practice as the consumers are still in genuine need of assistance and there are no other programs available that can clear energy debts and subsequently reduce instalment amounts. It

¹²⁴ See n110, p 75.

does however highlight that the Government's Winter Energy Concessions alone are insufficient to ensure energy affordability for low-income Victorians.

In 2003-04 DHS expenditure on relief grants increased by 20% for electricity customers and 58% for gas customers in comparison to the previous year. The size of the average grant increased as well, being \$375 for electricity customers and \$332 for gas customers.¹²⁵

Despite DHS assisting nearly 10,000 consumers with URGs in 2003-04, charitable organisations registered an increase in demand for relief assistance. For example, in the same period St Vincent de Paul Society Victoria experienced an 80% increase in demand for emergency relief to cover utility costs.¹²⁶

The Concessions Unit also offers assistance to replace or repair major appliances that cause high energy consumption through the Capital Grants Scheme. The scheme is much smaller than the Winter Energy Concession and URG schemes, both in terms of budget and the number of customers assisted. A barrier to accessing this scheme is cumbersome eligibility criteria requiring customers to demonstrate that an appliance has become more energy inefficient.

The table below lists all the energy related assistance schemes available to the approximately 1.3 million Victorian concession cardholders.

Table 1 - Energy related assistance schemes for Victorian concession cardholders

Victorian Energy Concessions	Description
Winter Energy Concessions	17.5% off two winter energy bills
Non-Mains Winter Energy	Flat annual rebate for LPG, diesel or heating oil
Life Support machines	Quarterly rebates for electricity bills
Summer Multiple Sclerosis Concession	17.5% off final quarterly summer bill
Group Homes Winter Energy	17.5% off winter energy bills
Transfer Fee Waiver	When there is a change off occupancy

¹²⁵ Department of Human Services Concessions Unit (2004), p 25.

¹²⁶ Figure compiled and provided by the St Vincent de Paul Society Victoria's Manager for Research and Policy, Gavin Dufty. The utility component refers to electricity, gas, water and telephone, but as there has been no change in demand for Telstra vouchers, Gavin Dufty advises that the increase must be in the energy and water area. 81.74% of St Vincent de Paul's assistance was food related whilst 5.62%, the second largest component of the assistance program, was directed towards utilities.

Service to Property Charge	For low consumption households to ensure that service charge does not exceed consumption charges
Off-peak Concession	13% off on the off-peak tariff rate component during the whole year
Utility Relief Grants	Once-off assistance to customers unable to pay their bill
Non-mains Utility Relief Grants	Once-off assistance to customers unable to pay for bottled gas (LPG)
Capital Grants Scheme	Once-off assistance to repair or replace essential appliances causing high energy costs

The New South Wales Government has a different, and more narrow, approach to government funded assistance schemes than Victoria. It very much relies on a pensioner energy rebate of \$120, a voucher-based scheme for customers in hardship and a life support concession scheme.

The voucher-based scheme is the Energy Accounts Payment Assistance (EAPA) and it is unique to New South Wales. With an annual budget of around \$8 million, EAPA provides \$30 vouchers to energy customers who are experiencing difficulty paying their bill. The vouchers are issued by participating Community Welfare Organisations (CWOs). The voucher system entrenches the role of community welfare organisations in assessing financial hardship and allows customers of any retailer to access assistance as required.

Given that many households in financial hardship are often facing a multitude of financial problems and are experiencing a degree of socio-economic disadvantage, CWOs can often provide more broad-based support and advocate on behalf of their client. However, the scheme is not without its faults, and access to a suitable CWO can be extremely problematic in regional parts of New South Wales. The scheme can also fail customers who do not traditionally access assistance via CWOs. The CWO is specifically targeted to assist households at risk of disconnection. As energy prices and disconnection rates increase, the New South Wales Government has faced pressure for increased funds to be allocated to the scheme.

3.3. Retro-Fitting

In 2003 the Victorian Government commenced a retro-fitting program for low income households called 'The Energy Task Force'. The program is a joint initiative of Sustainability Victoria, the Department of Human Services, the Department of Community Services and community organisations. It is managed by Sustainability Victoria and has so far assisted approximately 3000 homes in disadvantaged areas identified through the State's Neighbourhood Renewal initiative.

The retro-fitting involves draft-sealing and installing insulation and energy efficient lighting. Sustainability Victoria reported in December 2005 that households could save up to \$170 per annum on their energy bills from the makeover.¹²⁷ This is a substantial amount considering that the average gas Winter Energy Concession saving is \$69.

4. More is Needed

There is unanimously strong support amongst Victorian consumer representatives and welfare workers for the energy concessions and the URG. We are convinced that the number of customers experiencing energy related financial hardship and disconnection from supply would increase substantially if the schemes were reduced or abolished.

As illustrated by recent Government Inquiry into energy related hardship, Victoria has a sizeable problem with energy affordability despite the various measures in place.¹²⁸ However, an issue for consideration is whether a government's responsibility should be extended so that the size of the problem reduces over time. It is questionable whether it is good public policy to primarily address the problem through fire extinguishing activities such as grants, as there are no indications that the affordability problem is disappearing.

As the Energy Task Force scheme has only been operating for two years, it is too early to assess how the consumers in the retro-fitted households have fared in terms of energy related hardship. An extensive evaluation will be necessary to ascertain whether a sustained increase in energy affordability is experienced among these households as a result of lowered consumption.

In CUAC's view, the government should accept their responsibility and implement well considered policies to reduce the affordability problem in the long term, thereby ensuring that low-income consumers can afford a reasonable level of energy consumption without accumulating debt that the government ultimately has to pay to get cleared.

¹²⁷ Sustainability Victoria (2005).

¹²⁸ In March 2005 a Committee of Inquiry into Financial Hardship of Energy Consumers was established by Victorian Minister for Energy Industries and Resources.

Appendix 1

Addendum: Industry-Based External Dispute Resolutions

Simon Cleary and Fiona Guthrie

As discussed in Issues Paper 4, it is generally agreed by commentators that the court system is an inappropriate mechanism for solving consumer disputes. It is particularly inappropriate in relation to an essential service such as electricity. This addendum explains how industry-based EDR schemes operate – a model used extensively in Australia, but still relatively new in terms of the length of time they have been operating.

Industry-based EDR schemes are an alternative to the courts, set up specifically to provide speedy and just resolution of disputes. The term ‘industry-based’ refers to both the funding source of these schemes and their historical genesis as attempts at self-regulation by industry.¹²⁹ A fundamental tenet of such schemes is that the decision-making process is independent of both industry and government – decisions are made by an independent ombudsman.

Industry-based EDR schemes have grown spectacularly in Australia in the last decade. The EDR model was first introduced in 1990 with the establishment of the Australian Banking Industry Ombudsman.¹³⁰ With the success of the model in banking, it was later applied in other industries – including insurance,¹³¹ telecommunications¹³² and financial planning and stockbroking,¹³³ to name just a few. The first EDR scheme in the electricity industry was the Energy and Water Ombudsman of Victoria (EWOV) set up in 1995.¹³⁴

In 1997, what was then the Commonwealth Department of Industry Science and Tourism (DIST) released the seminal guide to the appropriate features of industry-based EDR (see box).¹³⁵ These benchmarks, commonly referred to as the DIST benchmarks, have been widely accepted. For example, Policy Statement 139 of the ASIC, which applies to Australian Financial Services Licence holders, is based on them.

¹²⁹ With the advent of Financial Services Reform, membership by of the majority of EDR schemes by industry is now a legal requirement. For example, banks must belong to an EDR scheme that is approved by the ASIC.

¹³⁰ Now called the Banking and Financial Services Ombudsman.

¹³¹ The Insurance Ombudsman Service was set up in 1993 (then called Insurance Enquiries and Complaints Ltd).

¹³² The Telecommunications Industry Ombudsman was set up in 1993.

¹³³ The Financial Industry Complaints Service was set up in 1999.

¹³⁴ Then called the Victorian Electricity Ombudsman.

¹³⁵ Benchmarks for Industry-Based Customer Dispute Resolution Schemes, DIST, 1997. The description of industry-based EDR is the more common description of the schemes today.

All of the jurisdictions that have introduced industry-based EDR schemes in the electricity industry have done so in ways consistent with the DIST benchmarks.¹³⁶ The schemes have a number of common features. These include that:

- governance is via a board, made up of equal numbers of directors representing consumers and industry, with an independent chair;
- decision-making is undertaken by an independent person (in most cases, designated as an ombudsman)
- decisions are based on fairness, good industry practice and the law. This distinction is important. The courts can only make decisions based on the law. This expansion provides much wider and fairer consumer redress;
- the schemes have a responsibility to identify systemic issues;
- the schemes report annually to the community;
- the schemes are free for consumers to access.

The DIST benchmarks are as follows:

Accessibility

The scheme makes itself readily available to customers by promoting knowledge of its existence, being easy to use and having no cost barriers.

- **Independence**

The decision-making process and administration of the scheme are independent from scheme members.

- **Fairness**

The scheme produces decisions which are fair and seen to be fair by observing the principles of procedural fairness, by making decisions on the information before it and by having specific criteria upon which its decisions are based.

- **Accountability**

The scheme publicly accounts for its operations by publishing its determinations and information about complaints and highlighting any systemic industry problems.

¹³⁶ Licensing regimes in some of the states explicitly require electricity companies to belong to schemes that meet these benchmarks.

- **Efficiency**

The scheme operates efficiently by keeping track of complaints, ensuring complaints are dealt with by the appropriate process or forum and regularly reviewing its performance.

- **Effectiveness**

The scheme is effective by having appropriate and comprehensive terms of reference and periodic independent reviews of its performance.

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