

Some Brief Late Comments
to the
Ministerial Council on Energy
Standing Committee of Officials

by the



Energy *Action*
Group

on the

2006 Legislative Package and the Consumer
Advocacy Arrangements

Another EAG non Advocacy Panel funded submission to MCE processes

Introduction

The Energy Action Group is a twenty eight year old, membership based, not for profit, incorporated consumer group attempting to represent the interests of less than 160 MWh and 10 TJ gas consumers across the East Coast gas and electricity markets. EAG has made submissions and representations to most jurisdictions and jurisdictional regulators across the east coast of Australia since the current reform program started in 1990.

It is worth noting that the EAG convened the first national small consumer round table but subsequently withdrew from what has become the National Consumers Round Table due to the direction the meetings were taking.

The major emphasis of the Round Table appears to consist of three elements

- a) The protection of low income consumers. Low income consumers constitute around 5% of the NEM energy load. Two jurisdictions - Victoria and NSW - fund low income advocacy for gas, electricity (and water). Victoria provides \$ 500,000 into what appears to be dysfunctional CUAC funding and advocacy arrangements with a further \$30,000 to \$40,000 of short term funding to VCoSS. The NSW government provided something like \$ 200,000 worth of funding to the PIAC UCAP program. The other NEM jurisdictionally based organisations, including ACoSS, rely on inadequate Advocacy Panel funding to provide less than adequate and, in some cases, less than competent, input to NEM consultation processes.
- b) Consumer protection writing and reviewing NEM and the jurisdictional Rules and Codes. The two organisations underpinning the Round Table legal contributions are the Qld based Consumer Credit Legal Centre with some assistance from the Queensland Consumers Association and the Victorian Consumer Action Legal Centre both heavily rely on Advocacy Panel funding to make a contribution to NEM and jurisdictional reviews.

EAG has a long history of being actively involved in a number of jurisdictional licensing rule and code changing consultations. The major point of difference between EAG and the Round Table participants is that our views have been formulated from experience and case work. It is EAG's basic contention that un-enforced licences rules and codes are worthless to consumers and that an emphasis on the minor tweaking of the Rules and Codes without enforcement doesn't particularly help consumers deal with utilities. Attachment 1, a 2004 EAG investigation into the relationship between the Victorian Ombudsman scheme and the Essential Services Commission of Victoria, demonstrates that many systemic problems do not get addressed by the statutorily responsible organisation. Unfortunately for Victorian consumers this position has not changed since Attachment 1 was written.

EAG is aware that in several jurisdictions market participant retailers and distribution companies are having difficulties in billing customers, have customers on the wrong "use of system" charges or fail to comply with the relevant codes relating to estimated billing procedures.

- c) The other important area activity of the Round Table's focus and Advocacy Panel Funding is so called "Capacity Building". The outputs of this process given the resources invested are far from spectacular¹.

Having witnessed a number of public performances by other organisations purporting to represent small consumer interests associated with the National Consumers Round Table, EAG took the decision that the organisation would not have the time and resources to devote to the National Consumers Round Table given the lack of knowledge of any of the members about most of the issues surrounding the electricity and gas industry. EAG believes that there are considerably more issues facing the NEM than representing just the interests of around 5%² of the energy sales across the market.

The other point of difference between EAG and the groups represented by the National Consumers Round Table is the strong active working relationship with EUAA and the MEU. EAG is the only active small consumer group working with the Major Energy Users Limited and the Energy Users Association of Australia on issues of common interest. A very conservative analysis indicated that at least 85% of the issues across the market are common for large and small consumers. In EAG's experience in working with both organisations this figure is more likely to be 90 to 95% of issues. EAG experience in working with these two groups shows that large consumers have the same problems as households and in many cases see and identify problems well before they become apparent to National Consumers Round Table participants. Unfortunately some market observers have the perception that EAG has one or another of the representatives of large consumers directing the organisation's views and performance. This perception is incorrect. EAG forms its views on the information available. The EAG does however have a policy position of creatively addressing issues and the organisation has been at the forefront of highlighting some of the gas and electricity market deficiencies on a range of issues. EAG also has a reputation for being outspoken but able to work collaboratively with a number of industry players across the gas and electricity market.

¹ EAG declined to join NEMChat, one of the vehicles used by the Round Table to capacity build, on the grounds that the then Consumer Law Centre Victoria, now Consumer Action Legal Centre, had the right to control who participated in the "egroup" and what contents were acceptable for the group to discuss. Our position on this issue would appear to be vindicated with the subsequent removal of one member of the group correctly claiming that they represented large consumers on a number of issues. However the same individual

- a) had a lot to offer to small consumers with their knowledge of gas and electricity issues
- b) more importantly has a formal position representing the interests of less than 160 MWh electricity and 10 GJ gas consumers on an Ombudsman scheme.

² EAG was instrumental in helping the Victorian Government set up a number of innovative low income programs starting in the 1980s, programs like the Victorian Winter Energy Concessions. This program is contributing around \$ 40 M/a to low income Victorian consumers; other states have followed this lead.

END USER ADVOCACY

The MCE has also proposed a set of changed arrangements to cover advocacy by end users. The MCE has had the existing arrangements under review since 2005 and its proposed changes cover:

- Improved governance and accountability by the Advocacy Panel; and
- The inclusion of funding for end user advocacy on gas (previously limited to NEM issues only).

The EAG's history of funding failure with the NEM Advocacy Panel clearly supports the need to review the existing advocacy arrangements. EAG has been one of the main proponents of the need for such a review.

The existing arrangements suffered from a number of fundamental flaws that, in conjunction, meant that they are inefficient, ineffective and dysfunctional in providing effective support for end user advocacy. Among the major flaws are:

- A very significant lack of gas and electricity industry knowledge amongst Panel members. Currently one panel Member has gas experience, another has been a Commissioner of a vertically integrated state owned utility.
- Ongoing poor and ineffective performance by the Panel in terms of its procedures, allocation of funds, and myopic decision-making which did not match the needs and priorities of end user advocacy, and lacked accountability in governance and its relationship with key end user bodies;
- The massive levels of funding required for administering a relatively small budget. The AP administrative budget is around 15 times EAG total annual expenditure. Given the role that the Advocacy Panel plays in the NEM and their future contribution in the development of a national gas market over \$500,000 /a of expenditure on administration is outrageous.

The most important benefits of the previous Advocacy Panel arrangements that must be retained are

- The Panel did not discriminate in terms of favouring particular types of end users.
- The allocation of funds recognized that funding for end user advocacy came from actual users via NEM fees, so that **ALL** end users contributed and should have a right to benefit from the allocation of advocacy funds.

EAG hoped that the approach of the MCE would be to reform the significant flaws in the existing advocacy arrangement whilst preserving the good points. This would have been logical and rational. Sadly this is not the case under both the MCE policy and the implementation of the appointment of Advocacy Panel Members by the AEMC.

Unfortunately what the MCE is proposing is itself subject to some fundamental flaws that will hinder and harm consumer advocacy into the future, and contribute to an

unstable and dysfunctional advocacy arrangement, as well as to a more inefficient, ineffective and inequitable use of funds. The consequence of both the AEMC Panel appointments and the MCE's policy work on consumer advocacy is to almost guarantee that the reform process will suffer and consumers will get second best outcomes..

One of the most disturbing parts of the MCE proposed reform package of the Advocacy Panel is that several jurisdictions have prevailed on the rest to fund small and medium sized consumers at the expense of large consumers to cover many of the jurisdictional consumer advocacy oversights and the systemic failure not to fund low income programs and environmental issues. The solution of legislating funding for small and medium sized businesses will not be solved by directing most of the Advocacy Panel funding in this area. Unfortunately it takes many years to develop the skills and knowledge sets to have an effective input to the consultation and decision making processes in the electricity and gas industries. The relatively low levels of community sector pay ensure that people with the right skills sets are attracted to the industry or to regulatory bodies. EAG finds that the MCE decision to fund small and medium consumer advocacy programs at the expense of large consumers who represent around 70% of the NEM revenue inequitable and not in the short or long term interests of the groups that the MCE believes that they are assisting by making this decision.

EAG believes that it is also worth mentioning at the outset is that there is a tendency in the advocacy reforms being advanced by the MCE to seeing a need for the Panel to be accountable to the MCE, via the AEMC. EAG has a serious concern that the MCE has ignored the need for the Panel to be accountable to end users. The major objective of the Advocacy Panel is to ensure that end users are intended to be the beneficiaries of the advocacy that the Panel funds and end users are providing the funds that the Panel disperses. The MCE has not provided for accountability back to end users.

Areas of Agreement with the MCE proposals

EAG supports the following areas of the MCE's Advocacy Panel reform program:

- The appointment of a Chair and members who will be appointed “on the basis of relevant expertise and experience, including knowledge of the energy sector”. However, EAG is of the belief that the AEMC has failed to achieve this objective with their round of recent appointments.
- The inclusion of gas in the areas that will be eligible for funding;
- The inclusion of the provisions that will (hopefully) have the effect of avoiding conflicts of interest within the Panel structure, operations, decision-making and advice, including:
 - The Panel will not be subject to any direction or control by the AEMC or MCE, which should ensure the independence of its decisions;
 - The Panel will be required to develop “guidelines for the allocation of grants”
 - The Panel is to prepare an annual budget and subject its draft budget to scrutiny via the consultation procedures set out in the Regulations, noting the utmost importance of involving end users in that process (this latter point should be clearly specified in the legislation or otherwise in the regulations);

- The need for the Panel to furnish an Annual Report and report on its operations within two months of the end of each financial year;
- The need to provide some dedicated resources, albeit kept to a modest and reasonable level, to assist the Panel in its functions. Not a budget of around \$500,000 which currently costs around 25% of the organisation's funding.

EAG does not necessarily oppose the MCE requirement for the AEMC to hold all funds received for end user advocacy. However EAG would comment that on the surface the Panel appeared to have at least managed this operation reasonably well to date.

Areas of contention with the MCE's proposals

The EAG along with other user groups has a number of important areas of disagreement with the MCE's proposal and seek a changes to them before they are legislated.

The inclusion of a Research function

The MCE has proposed that the Panel have a function to identify areas of research that would be of benefit to end users.

Given the role of the former Advocacy Panel in commissioning research in the past, EAG do not believe that there is a need for a research function to be commissioned by the Panel and note that none has been provided in the material released by the MCE. If research is necessary it should be the preserve of consumer advocacy bodies, not the Panel. The Panel is removed from end users and has limited contact with them, whereas end user advocacy bodies, especially those with a member base, are representative of end users, in regular contact with them and far better placed to identify matters needing research than the Panel.

Another example of this model already exists in the NEM, the Consumer Utility Advocacy Centre (CUAC), which has a role in commissioning its own work and undertaking research. Unfortunately, it has a poor track record of doing worthwhile work and has wasted funds on internal work to the exclusion of advocacy. Some of the CUAC commissioned work failed to adequately address the commission and it seems the consultants have not understood some of the issues that were being researched and reported on. EAG contends that in some cases they have not only not understood the issue but seem to have started a new process of inventing history in CUAC's or the consultant's own view. It would be a poor outcome if the Advocacy Panel followed in CUAC inauspicious footsteps.

EAG therefore strongly recommends that this function be removed and that all Panel funds for research and advocacy be allocated to end users.

Further EAG strongly opposes the narrow, discriminatory and inequitable allocation of funds under the proposed Section. 30 of the Bill:

In performing its functions–

(b) The Panel must pay primary regard to benefiting small to medium consumers of electricity and gas.

The MCE explanation fails to provide any reason as to why this provision has been included and what purpose it is proposed to serve. The MCE needs to clearly and specifically set out its reasons and the logic behind them if this clause has any credibility.

The effect of this clause strongly enhances the artificial divide between large and small consumers amply demonstrated in submissions from non membership based organisations purporting to represent small consumers.

EAG strongly believes that this clause completely contradicts an important and accepted original objective of the NEM Advocacy scheme, which was based on the principle that ALL end users had a right to be represented in debates and a right to access advocacy funds. This was accepted after a thorough review by NECA, which had direct involvement from end users across the spectrum and had to overcome strong industry resistance to the notion of funding advocacy. The MCE's proposal denies this right, whilst the MCE's process has had a peripheral engagement with end users and in part exhibits a strong sense of trying to placate small consumers and build a small consumer advocacy base to cover the jurisdictional failure in developing adequate advocacy arrangements. EAG would like to point out that there are at least two examples of advocacy organisations funded by jurisdictions that have been less than helpful representing their constituency over time.

EAG also would like to contend that it is also inconsistent with the direction of energy reform, which is intended to benefit ALL end users. The Council of Australian Governments recognised this in their statement of :

“COAG also recognised that energy markets should operate to maximise provision of reliable energy services and that the effective operation of an open and competitive energy market contributes to delivering benefits to households, small business and industry.”

Further EAG would also like to point out that the move to specific funding of small and medium consumers is also inconsistent with the Single Market Objective of the National Electricity Law, which states that:

“The national electricity market objective is to promote efficient investment in, and efficient use of, electricity services for the long term interests of consumers of electricity with respect to price, quality, reliability and security of supply of electricity and the reliability, safety and security of the national electricity system”.

Neither of these statements from CoAG nor the legal objective under the National Electricity Law passed by all NEM jurisdictions suggests any bias or favouritism in respect of particular types of energy users.

Our reading of them is that COAG and the MCE intend that ALL consumers be treated equally and in an unbiased manner. EAG has the belief that all consumers in the end should benefit from reform and have the ability to provide input into deliberations about the market and the directions that the market takes. The

provisions of the advocacy arrangements that the MCE proposes clearly contradict this proposition.

It also ignores the fact that all end users contribute to the advocacy fund through their NEM fees (a component of their electricity bills along with their gas bills in the future) and should have a right to expect access to the funds and to be treated equally in doing so, not in the biased manner being proposed by the MCE:

- The MCE may not be aware that larger users provide at least 70 percent of the funds made available for end user advocacy and should be entitled to benefit from the advocacy that is funded by the Panel. EAG strongly believes that large users have a right to feel they are being poorly treated by the MCE's proposal which almost completely fails to comprehend the real purpose of advocacy and how it can be made to work most effectively for most end users. The role of the National Consumer Round Table appears to have exacerbated this problem;
- If the MCE wishes to favour a particular group in allocating advocacy funding, it should either provide advocacy money through the public purse or else only levy the group of consumers who are benefiting. This proposition clearly applies to the funding of low income and environment groups in a number of jurisdictions outlined above.

EAG notes that the wording describing this provision in the draft Bill is quite different to that used in the MCE Communiqué outlining their original decision on advocacy reform and in the material released by the MCE explaining the proposed new advocacy arrangements:

"In undertaking its functions, the Panel will have regard for all energy users with a focus on "small to medium consumers."

The wording in the Bill does not give effect to the MCE's decision and there is confusion as to what the MCE's real intention is. This mixed message needs to be clarified.

- The MCE is probably not aware that most advocacy on issues central to the NEM and how it impacts on end users has hitherto been undertaken by bodies representing larger users or that the EAG collaborating with large end use organisations the EUAA and the MEU on a wide range of issues and, if it were not for these efforts, all end users would have been virtually unrepresented in these debates. The MCE may be under the impression that the National Consumers Round Table represent "small to medium consumers". In fact, they currently represent consumer protection bodies, socially disadvantaged consumers groups or environmental groups, and have tended to receive grants for more narrow or 'capacity building' type projects. Whilst some of these groups may have legitimate claims to access the advocacy funds, it would be foolhardy for the MCE to believe that they have the capacity (or experience) to contribute to the central elements of the energy reform process.

Moreover, many of these bodies do not have an energy consumer-focused membership base – some have no membership base at all – and do not represent the bulk of ordinary household consumers or SMEs. This should be a matter of serious concern to the MCE but their proposal will do nothing to

ensure that households or SME consumers benefit from effective advocacy. On the contrary, it may well end up diverting significant funds to unrepresentative and narrowly focused groups. It is unclear from the material released by the MCE how they intend to ensure that the above problems will not eventuate, or if they are even aware of them? Certainly, there is nothing in the draft Bill to provide us with any comfort on this.

The MCE should be made aware of the fact that much of the advocacy undertaken on issues central to the NEM has been by groups representing business users but that it is impossible to confine the benefits of this advocacy to their immediate constituents. It is in the nature of such advocacy that any benefits will more often than not be distributed widely across energy consumers. For example, the beneficial impact of advocacy on a review of network charges will be to keep these lower than would otherwise be the case but these benefits will be dispersed across a wide range of such charges and a wide range of energy consumers.

Regulators want to hear from all end users but won't get a broad range of consumer inputs or get even more selective input as a result of restricting funding to just small consumers. EAG has worked jointly with larger consumer organisations on a wide range of regulatory inquiries to ensure that all consumers have a voice in regulatory determination across the NEM and on gas market issues.

EAG also believes that the MCE proposal on restricting advocacy is also in direct contradiction to and completely inconsistent with Section. 31 of the draft Bill, which clearly says:

The Panel is not subject to direction by the AEMC or MCE in the performance of its functions.

Yet the MCE is directing it in respect of how it is to perform its functions in allocating funds to small consumers.

As a matter of record, EAG members and business users will be disadvantaged by this proposal but will still be required to pay for advocacy, and we object in the strongest terms to this biased and inequitable proposal. EAG therefore strongly oppose it. EAG believes that this decision will seriously disadvantage business users in future advocacy and, in our view, is likely to result in poorer and less representative advocacy that is biased towards input from only a small sub-set of groups who do not represent the bulk of actual energy users. This is a matter that should be of serious concern to the MCE if, as EAG believe to be the case the MCE is genuinely interested in well informed and sound policy decisions with input from all relevant stakeholders.

Given the above EAG urges that the Bill introduced into the SA Parliament should:

1. Provide for an Advocacy Scheme that treats all end users equally and allocates funds on a competitive basis.
2. Ensures that organizations making applications for funds are required to demonstrate their legitimate claims to be representing end users of energy.

3. Alternatively, provide for a mechanism whereby users can elect to direct their share of funding to the Advocacy Panel or to a nominated organization. This could be done annually via their bills (with a form and an explanatory note included briefly setting out the options available and their claims for funds).
4. If the MCE persists with this proposal, then it must ensure that the funding mechanism used only levies consumers who will be represented by the advocacy undertaken, that is, in support of small and medium consumers and that it specifically exempts users (eg > 4 GWh for electricity and 100 PJ pa for gas) who are effectively precluded from the benefits of such advocacy funding.

Source of advocacy funding

The draft Bill proposes to allocate funds for advocacy from two sources:

- Those allocated to advocacy on behalf of electricity users will be drawn from NEM fees (as is the case with the existing advocacy fund); and
- Those allocated to advocacy on behalf of gas users will be drawn from funds provided from moneys allocated to the AEMC.³

There is no explanation as to why this was deemed necessary.

Whilst EAG acknowledge that this is one method of providing funds – and that the lack of any agreement on the so-called ‘industry levy’ may have affected decision-making – EAG can see a number of problems with this method:

- Whilst it relates funds for electricity advocacy directly to electricity consumption, it does not do so for gas (the use of AEMC funds does not provide such a relationship);
- The use of multiple funding sources is messy and will create difficulties in terms of setting budgets, seeking amendments to budgets, the need for any additional funding during funding years, the allocation of funds between projects by the Panel, and Panel administration; and
- It will also create difficulties for advocacy by groups as between gas and electricity and could detract from advocacy efforts.

EAG believe it would be far better to draw all the advocacy funds from NEM fees, which would overcome these difficulties. Many users consume both electricity and gas and any equity considerations involved would seem to be very minor given the small proportion of NEM fees that advocacy funds comprise.

The draft Bill provides for the Panel to be assisted by an Executive Director and a “small secretariat” to provide administrative and research capacity. EAG has already argued that the provision of a research capacity is a risk given the history of the former Advocacy Panels Commissioned reports and the CUAC experience outlined above. EAG has a significant concern that this is the start of a ‘Panel bureaucracy’ and that it is clearly an ‘overkill’ response by the MCE. To date, the Panel has

³ The draft Bill also provides that funds allocated to advocacy on behalf of both electricity and gas users and for Panel administration will be drawn from both sources.

survived quite well (although there have been substantial increases in administrative costs, constituting around 25% of Panel revenue over time) with the services of an Executive Officer and by outsourcing its other administration needs, even though the costs associated with this activity are extraordinarily high compared to other organisations administrative expenses. EAG can see no reason why this can't continue to be the case! The Panel's workload will expand somewhat due to the inclusion of gas issues and a broader range of electricity issues, but as the MCE material makes clear this is not considered to be a significant increase in work load..

EAG also have concerns with the Panel staff being employed by the AEMC and believe that the Panel should employ its own staff as it has done in the past. There is no reason given in the material released by the MCE as to why this practice cannot be continued.

Need to supplement Advocacy Panel funding

EAG also believes that the Bill should make provision for the Panel to request supplementary funding during the course of a financial year if necessary. The levels of funding required for the ongoing reform program vary from issue to issue and the number of issues being worked on at the same time. Work requirements can vary dramatically from time to time. This becomes a major issue particularly when the reform work load is added to access and revenue regulatory determination across the NEM. Alternatively, the Panel should be given the flexibility (with MCE consent) to draw down on funding for the following year. EAG's main concern here is that unforeseen situations arise which put a drain on funding and there should be a mechanism that deals with this. One case in point is the recent ERIG process, which was unforeseen at the beginning of the Panel's funding year, but there have been other examples.

This year, three AER transmission revenue inquiries start along with the NSW electricity distribution business revenue determination, plus a number of AEMC Rule changes and the MCE agenda.

Scope of advocacy

The draft Bill refers to electricity and gas advocacy in general terms and does not seem to place any limitations on its scope, so long as they are related to energy reform or regulatory matters. We believe that this is appropriate and that the existing advocacy scheme was far too narrow in being confined to the NEM.

However, we note that the NGL is currently limited in its scope to gas access matters (although it is envisaged that wholesale market issues will be included later). We would not support limiting gas advocacy to the NGL/NGR, or limiting electricity advocacy to the NEL/NER.

Responding to grant applicants

EAG has had a history with the former Panel of a high level of rejection of applications without any significant feed back as to why. EAG strongly believes that the Panel should have a responsibility to respond to grant applicants (successful or not) with their decision (and any details of it) in an expeditious manner. In the case of

rejected or deferred applications this should also include reasons. Although the Panel has done this as a matter of procedure in a very cursory manner in the past, EAG believe that it would be useful to enshrine it as a responsibility of the Panel, either in the Bill or in Regulations.

Limited merits review

The current legal paradigm faced by gas and electricity market participants, with one exception, is the aggrieved company versus a regulator determination arguing an error at law before the relevant Appeals Tribunal. This adversarial arrangement places a regulator (and consumers who underwrite the determination) at a relative disadvantage. The worst outcome for the appellant is that the tribunal rejects the application and the evidence presented by the applicant. In all most every case so far in gas and electricity cases before Appeals Tribunals, the applicant has had wins that have significantly outweighed their (not inconsiderable) costs. The only exception has been the EPIC Dampier to Bunbury Gat Transmission Pipeline Action.

EAG understands that many of the senior council appearing for the industry applicants in Tribunal hearings can cost up to \$12,000/day plus the costs of the junior. It was rumoured that ACCC had to pay something like \$ 36,000 /day for AGL's counsel in the AGLv's ACCC Loy Yang case before the Australian Competition Tribunal, where the decision awarded costs against the Commission.

The one exception referred to in the previous paragraph relates to the appeal by GasNet against the ACCC revenue determination before the Australian Competition Tribunal. To date this is the only instance of a consumer group successfully attempting to get involved in a case by a market participant against a regulatory determination. EAG intervened and argued, as did GasNet, that ACCC had made errors in the determination. EAG successfully argued that ACCC had ignored some of their own consultants reports when they made the Weighted Average Cost of Capital determination. GasNet withdrew their contention that ACCC had erred by not taking all the facts into contention in their decision. However as an intervenor EAG was not able to raise important issues around the ACCC decision relating to depreciation on the Longford to Melbourne gas transmission pipeline.

The legislative packages released by the MCE on gas and electricity provide for a form of limited merits review on regulatory decisions. They also enshrine the rights of end users to access the limited merits review structure either as appellants or as intervenors. This includes bodies representing end users.

However, EAG would like to draw to the MCE's attention that groups representing end users are not financially capable of supporting an appeal. This has been a major issue preventing access to appeals mechanisms in the past. And it is far too cumbersome and complex to arrange for direct contributions from consumers, especially within the limited time periods provided for the lodgement of appeals against determinations and decisions.

These circumstances conspire to bias the appeal process in favour of regulated entities and against regulators and end users. This cannot be good for achieving efficient and

balanced outcomes from regulatory decisions that give effect to the Single Market Objective of the NEL and its equivalent in the NGL.

It is therefore of major concern to EAG that the advocacy reforms proposed by the MCE do not specifically allow for advocacy funds to be distributed for appeals-based advocacy. Being able to access advocacy funds for such purposes would be consistent with the objectives in the NEL/NGL, would support the objectives of energy reform (ie that all users should benefit from the reform process), and would support the objectives for advocacy (ie that it “should benefit consumers of gas and electricity (or both)”). EAG would also draw to the attention of the MCE that the inclusion of the limited merits review mechanism is likely to increase the incidence and importance of appeals as part of the regulatory processes in both electricity and gas.

In effect, end user advocacy around the appeals process will become integral to effective regulatory outcomes in terms of the electricity and gas market objectives, a point recognized by the MCE in terms of the access it has provided to end users in relation to appeals. If end users are unable to take part in the appeals process due to an inability to access advocacy funds for this purpose, then the benefits of earlier advocacy on an issue (and the use of advocacy funds) will be jeopardized.

Unfortunately Section 291 (1) of the draft Legislation in relation to indemnity costs against end users completely negates all the previous provisions and places any consumer group who tries to appeal a decision before the Australian Competition Tribunal in a position to bankrupt if their appeal is dismissed by the Australian Competition Tribunal. EAG understands that the intent of this Section was to dissuade consumer groups from appealing a regulatory or AEMC determination. As it stands the inclusion of this section in the Bill will work to achieve the no consumer appeal outcome. This section works completely against the Single Market Objective and is almost an unprecedented action in recent Australian legal history.

EAG therefore recommend that the draft Bill on Advocacy Reform include specific allowance for funding of appeals-based advocacy. EAG further recommend that applications for such advocacy be supported by information showing that the appeal is soundly based and that eligibility be limited to end users or to bodies that are representative of them and will have standing.

EAG believes that a number of Australian regulators bias their determinations in favour of the regulated entity to minimise the risk of appeals. To reiterate: if Section 291 (1) remains in the draft legislation no consumer who assesses the risk involved in this section will wish to appeal a determination. So the current legal appeals paradigm where the industry applicant v's the regulator appeals process will continue, this process provides a tilted playing field towards the applicant providing substantial rewards to ensure that asymmetric appeals against the regulator will continue into the future.. Unfortunately this process has already set a number of precedents that will need to be overturned in the future by another legislative package.

Information Disclosure

EAG believes that the provision of information disclosure requirements in the legislative package are fundamental to the regulation of both gas and electricity markets. Two cases have been run against the Essential Services Commission Victoria by Alinta in relation to related party transactions by United Energy. The first decision by the Essential Services Commission Appeal Tribunal (Victoria) greatly restricted the ESCV access to related party transactions. The ESC then had to “model” the Alinta/United Energy third party transactions. The resultant modelling then provided further evidence of “errors of fact” in the United Energy appeal against the ESCV Electricity Distribution Pricing Determination of 2005.

Another case against the ESCV is listed later this year by Alinta again who want to deny the Essential Services Commission Victoria information on related party transactions to Multinet, a Victorian gas distributor.

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

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

Form of Regulation

EAG believes, on the evidence available to our organisation, that the first option for the **Form of Regulation** should be the Expert Panel Option 3. “Light handed regulation without price monitoring”.

EAG does however does have reservations in promoting Option 3. There a number of systemic problems experienced by market participants associated with the NEMMCo MSATS and B2B systems requirements of the various Retail or Supply and Sale Codes required by the jurisdictions that then flow through to consumers lowering their confidence in the regulatory arrangements. The steadily increasing numbers of Ombudsmen complaints across the NEM highlight the nature of the problem when there is a lack of enforcement of the various Rules and Codes.

There is also a strong relationship between information disclosure requirements and the form of regulation. If the information disclosure requirements are weak then informed consumers will have little faith in the regulatory regime.

EAG is also sensitive to the issue of very poor quality explanations and information disclosure in many of the jurisdictional reports required by jurisdictional regulatory requirements. It is almost impossible to assess how any distribution business across the NEM sets up their tariffs and charges. Ongoing work by the AER or a delegated jurisdictional regulator needs to be carried out on issues around the quality of supply and the regulatory reporting requirements and retail and distributor market processes. The best approach to date across the market has been work by the Essential Services

Commission Victoria on the NEMMCo MSATS Customer Transfer arrangements. If consumers are to have any faith in the AER/AEMC regulatory arrangements then the AER needs to develop a skill set and a quality control regime to examine a range of NEM and gas market practices and procedures over time.

As a further precaution EAG suggests that the MCE require that the AER provide resources for a non legislated trial period of time (say three years), where any valid comments made by consumers about deficiencies, oversight or poor behaviour by market participants are investigated and publicly reported on a regular basis (say half yearly) by the AER over the funded period.

EAG has a number of important reservations around implementation of the regulatory accounting guidelines approach under the Australian light handed incentive regulation. The various jurisdictional regulators, ESC (V), IPART and the ACCC, have had considerable difficulties in developing a common data set to compare information across two regulatory cycles. This problem makes it very difficult to compare regulatory determinations. It is almost impossible to compare the two ACCC Transgrid transmission determinations or the 1999 and 2005 ESC of V Electricity Distribution pricing determinations. One of the objectives of the legislative package should be the development of data sets that allow the assessment of the effectiveness of the regulatory regime.

John Dick
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23rd January 2007

Appendix 1
ENERGY ACTION GROUP
REPORT ON THE
ESSENTIAL SERVICES COMMISSION
ENERGY AND WATER OMBUDSMAN VICTORIA
RESPONSE TO RETAILER NON-COMPLIANCE WITH ‘CAPACITY TO PAY’
REQUIREMENTS OF THE RETAIL CODE
September 2004

Background

Under the *Electricity Industry Supply and Sale Code 1997* retailers were required to take account of a customer's capacity to pay when negotiating an instalment plan. Instalment plans were required to be offered before disconnection could take place. This Code was reviewed in anticipation of full retail competition. The new Code commenced on 1 January 2001. *The Electricity Retail Code 2001* means that retailers have the right to recover debt but customers are protected against disconnection in cases of incapacity to pay. In incapacity to pay cases retailers are required to offer the customer an 'affordable' instalment plan that must account for on going consumption. This protection is known as the 'hardship' provision. Similar provisions exist for gas. The customer can take disputes regarding the Retail Codes to the Energy and Water Ombudsman Victoria (EWOV)

The EWOV reports systemic issues appearing in complaints to the regulator. Schemes such as the EWOV use the ASIC definition of systemic:

At a broad level, systemic issues can be distinguished from those issues that have no implication beyond the immediate actions and rights of the parties to the complaint (ASIC 1999)

The regulator (the ESC) is supposed to address systemic issues.

For many years community organisations and the EWOV (and its processor) have been bringing retailer non-compliance with the capacity to pay provisions of the Retail Code to the attention of the Essential Services Commission and its predecessor, the Office of the Regulator-General.

In 1998 the Financial and Consumer Rights Council (FCRC) collected 215 cases from financial counsellors detailing how privatisation of the gas and electricity companies was resulting in harsher treatment of customers experiencing 'incapacity to pay'. The report *Unfair Deal* (Kliger 1998) argued that there were unacceptable debt collection practices; that the State government's consumer protection obligations were inadequate; and that the consumer complaint scheme was inaccessible.

In 2001 the EWOV held a special conference on 'hardship' "Getting Connected – genuine utility-consumer partnership" 9th November 2001 – aimed at encouraging better and more flexible initiatives in debt collection, payment options and development of hardship policies – and in response to high disconnection rates appearing in the EWOV complaints.

In 2004, two years after household competition had been introduced FCRC revisited the issue. This time FCRC interviewed financial counsellors to gain an indicative understanding of caseload relating to utilities, and to capacity to pay issues. Case studies were used to highlight the variety of problems that had emerged. This report *Power, Markets & Exclusion* (Sharam 2004) suggested that there were likely to have been thousands of cases of retailer non-compliance with the Retail Code.

In 2004 VCOSS was approached by the ESC to make a special presentation on 'fuel poverty' as part of the Commission's investigation into performance indicators. A working group meeting was convened on 6th February 2004 in order that this presentation could be made and so that the ESC could formally consult with members of its Customer Consultative Committee performance indicators relating to 'hardship'. This meeting was recorded, and it was intended that the transcript should be placed on the ESC website. During the discussion after the presentation one of the customer advocacy organisations raised the issue of customers not being able to obtain affordable instalment plans. The response of the senior officer was that such treatment was not permitted under the Retail Code. Another participant pointed out that the issue of retailer non-compliance with the 'hardship' provisions of the Retail Code has been brought to the attention of the ESC on a number of occasions, not least by FCRC's report *Power, Markets & Exclusion*. The Energy and Water Ombudsman confirmed that EWOV had also raised this issue with the ESC many times. The ESC officer refused to discuss the matter closed the meeting early. The transcript published on the ESC website did not include any of the discussion.

Following this meeting the Energy Action Group requested under Freedom of Information legislation documents held by the ESC relating to matters brought to it by the EWOV/EIOV that concerned hardship, retailer compliance and affordability.

The ESC and the EWOV have a Memorandum of Understanding and meet monthly. The ESC does not take formal minutes of these meetings. The FOI officer advised EAG that

“I have been advised that no minutes per se are taken at these meetings between the ORG/ESC and EWOV. However, at each meeting, these agendas are updated under the “Outstanding actions/issues” column to reflect discussions at the previous meeting. You are in receipt of all agendas which contain these updates” (Taft, 15 July 2004)

The EWOV produce the agenda and update the action items. After further correspondence with the ESC regarding the apparent incompleteness of these ‘working agendas’, the ESC advised

“Your request was for documentation related to “hardship”, “affordability” and “retail compliance with the capacity to pay provisions of the Electricity Retail Code and the Gas Retail Code”. The material sent to you covers these areas” (Taft, 21 September 2004).

The EAG was seeking to understand whether or not ‘hardship’, ‘affordability’ and/or more formally retailer non-compliance with the incapacity to pay provisions of the Retail Codes was reported by the EWOV to the ESC and whether the EWOV reported these as a ‘systemic’ issue which then would have then required the ESC to act.

What did EAG learn?

The following excerpts show that the ESC was made aware five years ago that there was a problem with disconnection relating to handling of the ‘incapacity to pay’ provisions of the Codes. Whilst the EWOV was inconsistent in the way it handled the matter it did alert the regulator to the systemic nature of the problem – widespread retailer non-compliance with the Retail Code – and kept putting it on the agenda. The ESC apparently would never acknowledge that there was a systemic problem.

1.	Letter from EIOV to ESC 3 March 1999 Subject: re Customer Complaints
<p>The main areas where we see problems with customer service are</p> <p>* Billing: inflexibility about arrears arrangements, hasty disconnections without proper consideration of debt management, rigid application of standard payment rules instead of individual focus on particular customer situation, incorrect and inadequate tariff advice</p>	

2.	Report to the Office of the Regulator-General from the Energy Industry Ombudsman Victoria 1 March 2000 EIOV Gas Disconnection Cases Received 1999
<p>Many of the cases that come to the EIOV have indicated an inflexible response by the companies to customers who are experiencing payment difficulties. The EIOV has received cases in which customers are told what payment arrangement the company will accept and when the customer advises they cannot afford it, the company states that they must either accept or be disconnected...</p> <p>The companies state that they are reticent to establish plans which result in debt accumulation, however, simply extending the repayment of the arrears and leaving current consumption payments in place can frequently reduce the impact of debt arrears so that the customer can get over a particular financial crisis. If on the other hand, customers accept payment arrangements they know they cannot afford, they cannot keep to them and are then disconnected. Company records of customer payment histories often show a string of broken payment plans and disconnection. These in turn often further damage the ability of the customer to negotiate in the future...financial counsellors claim to have repeatedly attempted unsuccessfully to negotiate reconnection or payment arrangements on behalf of customers. Financial counsellors often report the same types of issues of inflexibility that customers report.</p>	

3.	Letter to ORG from EIOV 20 April 2000 Re: Electricity/Gas Performance reporting –EIOV Complaints
<p>Of concern was the proportion of <i>Affordability</i> gas cases which involved imminent or actual disconnection. The EIOV received twice the rate of gas disconnection cases to electricity disconnection cases in 1999. The EIOV is looking at this issue to see whether gas company policies or procedures may need improvement to lower case numbers.</p>	

4.	OUTSTANDING ISSUES EWOV/ORG Friday 10 August 2001C:\TEMP\ORG-EWOV Outstanding Issues.doc	
Issue	Issues for Office-EWOV liaison and referral protocols	
<p>High gas disconnection rates</p> <p>The EWOV has reported to the Office regarding higher gas disconnection rates since mid 2000. EWOV discussed with the Office that the gas companies' billing information systems did not have the capacity to check compliance with the account collection cycle. The EWOV has continued to report to the Office higher disconnection rates for gas compared to electricity. The EWOV acknowledges that, as part of its recent review of the Gas Customer Service Code, the Office has now delayed the introduction of the shortened collection cycle on advice from EWOV that this may have detrimental affect on gas disconnection rates. EWOV also acknowledges that the Office has focussed attention on disconnection rates in both its electricity and gas Comparative Performance reports.</p>	<p>The EWOV asks whether it is appropriate for the Office to conduct an audit of gas companies' compliance with the former Gas Customer Service Code/new Gas Retail Code disconnection procedures. This has been suggested previously.</p>	

5.	ORG – EWOV working agenda –September 2001H:\ORG\ORG EWOV working agenda 1 September 2001.doc	
Current General Issues	Outstanding Actions/Issues	
<p>High gas disconnection rates</p> <p>The EWOV has reported to the Office regarding higher gas disconnection rates since mid 2000. The EWOV has continued to report to the Office on higher disconnection rates for gas compared with</p>	<p>The EWOV asks whether it is appropriate for the Office to conduct an audit of gas companies' compliance with the former Gas Customer Service Code/new Gas Retail Code disconnection</p>	

<p>electricity. The EWOV acknowledges that, as part of its recent review of the Gas Customer Service Code, the Office has now delayed the introduction of the shortened collection cycle on advice from EWOV that this may have detrimental affect on gas disconnection rates. EWOV also acknowledges that the Office has focussed attention on disconnection rates in both its electricity and gas Comparative Performance reports.</p>	<p>procedures. This has been suggested previously.</p>
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<p>6.</p>	<p>ORG – EWOV working agenda – October 2001 \\EIOV\exec\ORG\ORG EWOV working agenda October 2001.doc</p>	
<p>Current General Issues</p>	<p>Outstanding Actions/Issues</p>	
<p>High gas disconnection rates The EWOV has reported to the Office regarding higher gas disconnection rates since mid 2000. The EWOV has continued to report to the Office on higher disconnection rates for gas compared with electricity. The EWOV acknowledges that, as part of its recent review of the Gas Customer Service Code, the Office has now delayed the introduction of the shortened collection cycle on advice from EWOV that this may have detrimental affect on gas disconnection rates. EWOV also acknowledges that the Office has focussed attention on disconnection rates in both its electricity and gas Comparative Performance reports.</p>	<p>The ESC advised the EWOV at the September 2001 Office/EWOV meeting that it had reported in Gas Performance report on this issue and had discussed the matter directly with OE. OE has advised that it will be taking actions on this issue. The Office to advise the EWOV of any further progress regarding this.</p>	

<p>7.</p>	<p>ORG – EWOV working agenda – November 2001 H:\ORG\ORG EWOV working agenda November 2001.doc</p>	
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Current General Issues	Outstanding Actions/Issues
<p>High gas disconnection rates</p> <p>The EWOV has reported to the Office regarding higher gas disconnection rates since mid 2000. The EWOV has continued to report to the Office on higher disconnection rates for gas compared with electricity. The EWOV acknowledges that, as part of its recent review of the Gas Customer Service Code, the Office has now delayed the introduction of the shortened collection cycle on advice from EWOV that this may have detrimental affect on gas disconnection rates.</p> <p>EWOV also acknowledges that the Office has focussed attention on disconnection rates in both its electricity and gas Comparative Performance reports.</p>	<p>The ESC advised the EWOV at the September 2001 Office/EWOV meeting that it had reported in Gas Performance report on this issue and had discussed the matter directly with OE. OE has advised that it will be taking actions on this issue. The Office to advise the EWOV of any further progress regarding this.</p>

8.	C:\documents and Settings\sm\Local Settings\Temporary Internet Files\OLK3\ESC EWOV working agenda May 2002.doc
Finalised Issues/Papers since July 2002)	Summary of outcomes
<p>High gas disconnection rates XXXX</p> <p>The EWOV reported to the Commission re this issue and provided the Commission with case statistics that for the 2001 calendar year. The case statistics indicate that XXXXXX Gas disconnection cases remain high and are significantly higher than XXXXXXXXXXXX</p>	<p>The ESC advised the EWOV at the monthly meeting of 5 April 2002, that the ESC was reviewing the disconnection rates of gas retailers and would be writing a “please explain” letter to XXXX regarding its continuing high level of disconnections. The ESC is also currently drafting the Gas Comparative Performance Report, and the disconnection rates will be published in the Report and in relevant press releases.</p> <p>The EWOV requests advice as to XXXX</p>

	response to the ESC's letter.
<p>Electricity disconnection rates 2001</p> <p>An analysis of electricity disconnection cases reveal that there was a 1465 increase in disconnection cases received for investigation in 2001, compared with 2000. XXXX Electricity disconnection cases accounted for 39.5% of all electricity disconnections cases received in 2001. These increases were evident in both six monthly periods of 2001. The EWOV provided the ESC with relevant case data re this issue.</p>	<p>The ESC advised the EWOV on 5 April 2002, that this would be reviewed and outlined in the next Comparative Performance Report. The ESC will discuss this matter further with the EWOV in the report preparation.</p>

9.	C:\documents and Settings\mr\Local Settings\Temporary Internet Files\OLK3\ESC EWOV working agenda June – July 02.doc
Current General Issues	Outstanding Actions/Issues
<p>High XXXX gas disconnection rates</p> <p>The EWOV reported to the Commission re this issue and provided the Commission with case statistics that for the 2001 calendar year. The case statistics indicate that XXXXXX Gas disconnection cases remain high and are significantly higher than XXXXXXXXXXXX</p>	<p>The ESC advised the EWOV at the monthly meeting on 10 May 2002, that it awaiting a response to a “please explain” letter the ESC had written to XXXX. The EWOV requests advice as to XXXX response to the ESC's letter.</p>

10.	Energy and Water Ombudsman Victoria Information paper for Essential Services Commission Customer Consultative Committee 17 June 2002
General Issues	
<p>The EWOV meets with the Essential Services Commission on a monthly basis to discuss systemic issues and individual cases requiring ESC regulatory interpretation. In addition to the issues raised above, the current systemic issues listed for discussion include:</p> <p>* Upward trend in electricity and gas disconnection cases</p>	

11.	
Current General Issues	Outstanding Actions/Issues
<p>High XXXX gas disconnection rates</p> <p>The EWOV reported to the Commission re this issue and provided the Commission with case statistics that for the 2001 calendar year. The case statistics indicate that XXXXXX Gas disconnection cases remain high and are significantly higher XXXXXXXXXXXX</p>	<p>The ESC advised the EWOV on 12 July 2002, that following XXXX response to the ESC's "please explain" letter to XXXX John Tamblyn was to meet with XXXX to discuss this issue and XXXX proposed actions to address this matter. The EWOV provided case data to the ESC regarding XXXX disconnection cases in the last 18 months. The ESC advised on 12 September 2002, that XXXX had undertaken to address this issue. The ESC was to review XXXX response and undertakings in the following week. The EWOV requests an update from the ESC on this issue.</p>

12.	Energy and Water Ombudsman Victoria Information paper for Essential Services Commission Customer Consultative Committee 18 September 2002
General Issues	<p>The EWOV meets with the Essential Services Commission on a monthly basis to discuss systemic issues and individual cases requiring ESC regulatory interpretation. In addition to the issues raised above, the current issues listed for discussion include:</p> <p>* Gas and electricity disconnection and restriction rates</p>

13.	C:\documents and Settings\sm\Local Settings\Temporary Internet Files\OLK3\ESC – Finalised items 1 July 02 – 30 June 03.doc
Finalised Issues/Papers since July 2002)	Summary of outcomes
<p>High XXXX gas disconnection rates</p> <p>The EWOV reported to the Commission on this issue on 23 March 2002, and provided the Commission with case statistics that XXXX Gas disconnection cases remained high and were</p>	<p>On 29 November 2002, the ESC advised the EWOV that it had met with XXXX about this matter. The ESC advised it was taking no further action on this matter at this stage, due to:</p> <ul style="list-style-type: none"> • XXXX disconnection numbers

<p>significantly higher than the other 2 incumbent gas retailers.</p>	<p>being 75% in 2002, c/w 2001;</p> <ul style="list-style-type: none"> • XXXX establishing a hardship policy; • ESC believed that XXXX had changed its behaviour regarding disconnections. <p>ESC advised that it would continue to monitor this issue through the performance regime.</p>
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<p>14.</p>	<p>Energy and Water Ombudsman Victoria Information paper for Essential Services Commission Customer Consultative Committee 4 December 2002</p>
<p>General issues</p> <p>The EWOV meets with the Essential services Commission on a monthly basis to discuss systemic issues and individual cases requiring ESC regulatory interpretation. In addition to FRC [full retail competition] issues, matters recently raised include:</p> <p>* An analysis of the EWOV's disconnection /restriction cases involving 'capacity to pay' issues.</p>	

<p>15.</p>	<p>E mail from EWOV to ESC 3 December 2002</p> <p>Subject: FW: Confidential – Draft Electricity Retail Report</p>
<p>10. The increase in disconnection cases received by EWOV may be partly attributable to...A higher number of disconnection cases may also reflect a less flexible approach to negotiating payment plans.</p>	

<p>16.</p>	<p>Email from EWOV to ESC 13 February 2003</p> <p>Subject: ESC Audit of Energy Retail Businesses</p>
<p>3. disconnection and capacity to pay (ERC [Electricity Retail Code] and GRC [Gas Retail Code] clause 11.1 and 11.3). On 26 November 2002, the EWOV provided the ESC with a paper entitled Research into Disconnection and Restriction cases (Residential Customers) received by the EWOV from January – September 2002.</p> <p>This report highlighted the prevalence of capacity to pay issues in the EWOV's 2002 casework. The EWOV's paper also explores why it can be difficult to assess a retailer's compliance with clauses 11.1 and 11.2 of the Retail Codes. Please refer to the EWOV's paper for more information.</p>	

17.	<p>Letter from EWOV to ESC 8 April 2003</p> <p>Subject: EWOV statistics for the ESC's Electricity and Gas Comparative Performance reports covering 2002</p>
<p>3. Electricity cases received by the EWOV in 2002</p> <p>As a general comment, Affordability issues remain prevalent in the EWOV's electricity cases. Disconnection cases form a significant part of the 'Affordability' issue category</p> <p>4. Gas cases received by the EWOV in 2002</p> <p>As a general comment, Affordability issues remain prevalent in the EWOV's electricity cases. Disconnection cases form a significant part of the 'Affordability' issue category</p>	

18.	H:\jb\esc\ESC – Working Agenda April 03.doc	
Current General Issues	Outstanding Actions/Issues	
<p>Disconnection/restriction – rate of EWOV case receipt</p> <p>* The EWOV has regularly kept the ESC informed about disconnection/restriction issues. This has occurred through working agenda reports, information/comments by EWOV for ESC public performance reports, and EWOV public reporting and briefing sessions. Disconnection/restriction rates are of high importance both to the EWOV and the ESC. The EWOV has been concerned for some time that its reporting of increases of disconnection/restriction cases raises a risk issue for the EWOV and the ESC regarding public perception about any action or non action to address these issues. The EWOV suggests that monitoring of disconnection issues remain as an issue of high importance on the working</p>	<p>The ESC requested that the EWOV provide a detailed research paper on industry compliance with disconnection/restriction regulations. This arose from discussion held at the September 2002 meeting of the ESC's CCC. The EWOV provided this paper in November 2002. The EWOV made a number of recommendations as part of the paper, however it did not receive any feedback from the ESC.</p> <p>The ESC has now established a disconnection working group. At the ESC's request, the EWOV will be providing the working group with a de-identified version of its disconnection research paper. The EWOV is happy to participate in the meetings of the disconnection working group.</p>	

agenda, with regular review.	
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19.	R:\Intranet documents\ESC EWOV working agenda\Current.doc	
	Nature of Issue	Outstanding Actions/Issues
		<p>Working Agenda Meeting Update 26/3/04</p> <p>At the 26 March 2004 meeting, EWOV tabled report titled Disconnection \$ Restriction – July to December 2003 Cases and Case Trends. On 8 April 2004, EWOV XXXX provided ESC XXXXXXXXXX with further details requested by ESC, namely de-identified retailer details re cases involving potential compliance issues to do with capacity to pay issues. EWOV requests feedback after esc has had an opportunity to review EWOV's report.</p>

20.	EWOV data for ESC electricity and gas (energy) comparative performance reports covering 2002 Compiled 3 May 2004	
	<p>Note 2'Affordability' includes billing issues relating to account arrears, backbills, concessions, credit assessment, delays, direct debit, disconnection, easyway payments, estimated bills, high bills, reconnection, refunds, refundable advances, service charges and tariffs, as well as transfer issue relating to access to supply.</p>	

21.	Email from EWOV to ESC 10 June 2003	
	Subject: FW Performance Indicators – Disconnection and Customers in Financial Hardship	
	<p>The EWOV suggests that one of the deliverables on the consultant's report should be whether or not the Retail Code(s) can be clarified to assist electricity, gas and water providers to understand their obligations in relation to capacity to pay issues. This point is explored at pages 5-6 of the EWOV's research paper.</p>	

22.	EWOV Report to the Essential Services Commission Disconnection and Restriction: July – December 2003 Cases and Case Trends March 2004	
	EWOV's random sample reviews of 25% of electricity disconnection cases received	

from July – December 2003 found that 58% of Enquiries and 77% of Cases for Investigation **clearly involved capacity to pay issues**

EWOV's random sample reviews of 25% of gas disconnection cases received from July – December 2003 found that 78% of Enquiries and 71% of Cases for Investigation clearly involved capacity to pay issues

The substantial number of cases being received by EWOV and the results of EWOV's sample reviews strongly suggest that the hardship programmes implemented (or being implemented) by a number of electricity and gas retailers are not yet sufficiently accessible to customers or comprehensive in detail to proactively address capacity to pay issues...More specifically: A number of customers stated they were placed on payment plans that they clearly could not afford...The electricity case studies in section 5.4 of this report (below) provide some practical examples of where an electricity **retailer does not appear to have adequately taken into account the customer's capacity to pay when seeking to establish a payment arrangement** ... The gas case studies in section 5.4 of this report (below) provide some practical examples of where an electricity retailer does not appear to have adequately taken into account the customer's capacity to pay when seeking to establish a payment arrangement .

23. Energy and Water Ombudsman Victoria Information paper for Essential Services Commission Customer Consultative Committee 15 March 2004

Issues raised and discussed with ESC

The EWOV regularly holds discussions with the Essential Services Commission in relation to systemic issues and individual cases requiring ESC regulatory interpretation. In addition to FRC [full retail competition] issues noted above, a number of matters continue to under discussion, including:

* Disconnection and restriction cases - EWOV is preparing a report on recent disconnection and restriction cases involving 'capacity to pay' issues.

24. Email From EWOV to ESC 8 April 2004
Subject: EWOV's Disconnection + Restriction Report to ESC – further details

As requested, please find following further details regarding EWOV's report. In particular, please find further details regarding the electricity and gas cases that EWOV identified in its sample reviews of **cases as involving potential compliance issues in relation to 'capacity to pay'**. In the cases detailed below, it appeared that

the retailer either:

- Did not take into account customer's capacity to pay when seeking to establish a payment arrangement; or
- Did not *adequately* take into account the customer's capacity to pay.

EWOV public reporting

Resolution No. 17 (1 Jul – 31 Dec 2003)

High disconnections reported but not cited as a systemic issue or reported to the ESC as systemic.

Resolution No. 16 (1 Jan – 30 Jun 2003)

Mentions 'billing' issues relating to FRC as systemic but in separate article discusses EWOV Special report on disconnection and restriction of supply (capacity to pay) without stating that it constituted a 'systemic' issue. Recommendations (p.9)

- that the retail code be reviewed and relevant clauses clarified
- that the ESC develop of 'good practice' guideline for retailers dealing with capacity to pay issues.

The guideline refers to that developed by energywatch and Ofgem in the UK not to the guidelines associated with Victoria's Retail Code. The former are voluntary and the later are legally binding regulatory instruments.

Resolution No. 15 (1 Jul – 31 Dec 2002)

Reporting on matters put before the ESC as systemic: "high gas and electricity disconnection rates' (p.3)

Otherwise systemic billing delays report back from previous issue of Resolution.

Article on the adoption of many retailers of voluntary 'hardship' policies but EWOV notes in same article that electricity disconnection cases up by 21% (although gas down by 9%)

Resolution No. 14 (1 Jan – 30 Jun 2002)

Reports on high disconnection rates, reasons given are need for EWOV details on notices and more awareness of scheme amongst community organisation. However, does not state as in doc 15, that may result from less flexible credit management by retailers.

Systemic issues reported to ESC include the high gas disconnection rates and upwards trend in electricity disconnections.

Case study report on Binding Decision re 'Hardship'. This is the only Binding Decision re capacity to pay.

Resolution No. 13 (1 Jul – 31 Dec 2001)

Reported on the Getting Connected conference
Systemic issues reported the ESC: disconnections

Resolution No. 12 (1 Jan – 30 Jun 2001)

Reported on high disconnections stating the result appeared to be due to less flexible payment arrangements. EWOV has raised the issues with companies concerned and with the Office of the Regulator-General. Did not classify as systemic.

Resolution No. 10 (1 Jan – 30 Jun 2000)

Reports on high gas disconnections, suggests retailers should be taking greater account of capacity to pay. Not cited as systemic

Resolution No. 9 (1 Jul – 31 Dec 2000)

Notes higher than anticipated gas disconnection rates

Resolution Nos. 11, 8, 7, 6, 5, 3, 2

No specific attention to disconnection rates. No mention of systemic

Resolution No 1

Discusses a hardship case, debt waiver agreed.

Annual Report 2003

AGL, Origin Energy and TXU noted as moving to develop hardship policies.
Submitted to the ESC a systemic issue, the findings of a special research project on disconnection and restriction cases EWOV received from January – September 2002.

Annual Report 2002

Reported on the 'Getting Connected — Genuine Utility–Consumer Partnerships' conference held on 9 November 2001 in Melbourne regarding hardship
High disconnections noted but not listed as a systemic issue

Annual Report 2001

EWOV reported gas disconnection cases and stated it raised the issue directly with the Office of the Regulator-General. Stated that Gas retailer Origin Energy gas Disconnection cases appears to generate from a less flexible approach to payment arrangements

Annual Report 2000

Reports on high gas disconnections, suggests retailers should be taking greater account of capacity to pay. Not cited as systemic

Annual Report 1999

Notes high gas disconnection rates not mentioned as systemic

Annual Report 1998

No mentions

ESC response

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

In terms of ESC performance reporting, data is collected from the retailers. No attempt is made to triangulate by obtaining data directly from customers. Data provided by community organisations has been ignored.

Discussion

The EWOV can make Binding Decisions and could have exercised this power to send a very sharp signal to retailers that non-compliance would not be tolerated. Instead only one such decision has been made, and FCRC (Sharam 2004) reports that taking complaints to the EWOV frequently leaves the customer in the position of having an unaffordable instalment plan. The EWOV also has a MOU (see http://www.esc.vic.gov.au/apps/page/user/pdf/MOU_EWOV_Nov03.pdf) with the ESC that it could have used to prompt the ESC into addressing the issue appropriately. It has not used the dispute resolution mechanism available in the MOU. It is also worth commenting that despite EWOV's efforts to bring this systemic issue to the attention of the ESC, EWOV has not been consistent in it's reporting. A more robust identification of the issue as 'systemic' and linkage to retailer non-compliance with the Retail Codes may have assisted in prompting the ESC to act.

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

References

ASIC (1999) *Approval of external complaints resolution schemes*, ASCI Policy Statements [PS 139]

[http://www.asic.gov.au/asic/pdflib.nsf/LookupByFileName/ps139.pdf/\\$file/ps139.pdf](http://www.asic.gov.au/asic/pdflib.nsf/LookupByFileName/ps139.pdf/$file/ps139.pdf)

Kliger B (1998) *Unfair Deal*, Financial and Consumer Rights Council, Melbourne

http://avoca.vicnet.net.au/~fcrc/research/utility/unfair_deal/index.htm

Sharam A (2004) *Power, Markets & Exclusion*, Financial and Consumer Rights Council, Melbourne <http://www.vcross.org.au/images/reports/Full%20Report.pdf>

The history of Advocacy Panel funding over the past 18 months for most small consumer groups highlight a process of unenlightened self interest with minimal outcomes for the customer base that the funded groups purport to represent.

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