Regulation and Consumer Benefit: Compliance in the National Energy Market

A DISCUSSION PAPER

FOR THE

PUBLIC INTEREST ADVOCACY CENTRE

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Foundation for Effective Markets and Governance

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Foreword

This paper was prepared by the Foundation for Effective Markets and Governance, but the views expressed herein are those of the project group and do not necessarily reflect the views of all members of the Foundation.

The project group was:

- Allan Asher - CEO of Energywatch in the UK, former Deputy Chair of the ACCC;
- Robin Brown – consultant in public policy and administration specialising in consumer / competition regulation, President ACTCOSS, Council Member of the Australian Consumers' Association, former CEO of the AFCO (now Consumers' Federation of Australia);
- Bill Dee – consultant in public policy and administration and business systems specialising in consumer / competition regulation and in complaint handling and compliance issues, former senior ACCC officer;
- John T D Wood - consultant in public policy and administration specialising in consumer / competition regulation and government accountability systems, consultant in complaints and ombudsman systems, former Director of the Federal Bureau of Consumer Affairs, former Deputy Commonwealth Ombudsman, Council Member of the Australian Consumers' Association;
- Ian McAuley – lecturer in the School of Business and Government, University of Canberra, researcher and trainer for the not-for-profit and public sectors in public policy and administration; and
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SUMMARY

Key Points

- A competitive national energy market has potential to deliver price and service quality benefits to most small consumers (households and small businesses) if effectively regulated. Theory and research suggests to us that without effective regulation the market is likely to be somewhat dysfunctional for most small consumers and highly dysfunctional for some.
- More research is needed implying greater research capacity.
- Public policy on energy must be co-ordinated with public policy on poverty, sustainability and industry development.
- Energy markets have special characteristics demanding special regulation.
- When markets are immature special regulation is required and though this varies amongst jurisdictions no Australian energy market can be said to have reached maturity.
- Codes are essential to regulate:
  - consumer information: marketing conduct, metering and billing, and
  - conduct when things go wrong: disputes, disconnections and debt.
- Regulation by administrative instrument on balance has advantages over regulation by legislative instrument.
- Licensing systems have significant compliance advantages. There is no convincing evidence available that license systems have been or are barriers to entry nor that other approaches would deliver good compliance outcomes, including for codes for consumer protection, any more efficiently. There is thus no reason to depart from the license approach for a national energy market.
- A regulatory regime requires strong and sustained consumer (especially disadvantaged consumer) and public interest advocacy. In Australia this is the biggest inadequacy and we compare very unfavourably in this regard with the UK and the USA.

On 20 July 2005 the Foundation for Effective Markets and Governance was contracted by the Public Interest Advocacy Centre Ltd (PIAC) to provide advice on compliance arrangements appropriate for a system of licensing energy utility companies.

Following the 2002 Parer Report the Ministerial Council on Energy (MCE) initiated a further round of reform of the regulatory framework for the electricity and gas industries. This is designed to strengthen the national energy market in Australia and create further competition.

PIAC intends to contribute to the reform process. Accordingly, PIAC wishes to gain a better understanding of:

- approaches currently employed in Australian jurisdictions for monitoring and

enforcement of licence conditions imposed on utility distributors and retailers;

- how these approaches compare with those in the United Kingdom and some jurisdictions in the United States;
- what elements would comprise an effective approach to licence compliance and enforcement in a new national licensing system, particularly in relation to licence terms dealing with consumer protection and consumer welfare; and
- options for public reporting and disclosure of licence monitoring and enforcement activities.

The approach taken in preparing this report included:

- analysis of current Australian arrangements to licence compliance and enforcement;
- identification and brief research into possible precedents in other jurisdictions;
- some deeper research into specific jurisdictions with a view to identifying procedures and processes likely to be applicable in an Australian context;
- discussions with regulators, complaints handling bodies, utility companies and consumer groups on arrangements currently in operation; and
- discussions with a range of stakeholders and experts on the feasibility of other procedures and processes being introduced.

When a market is to be employed to deliver goods or services to the community we believe a number of interdependent elements must be involved for delivery to be equitable and efficient:

- research;
- advocacy;
- policy and rules; and
- compliance action and consumer support

The overall objective for regulation of an energy market, as for any market, is to make the market work as well as possible for all. Overseas and some local research suggests that for many consumers energy markets are at least somewhat dysfunctional and for some consumers they are highly dysfunctional.

Greater research capacity is required to fully inform policy and rule making and regulatory actors.

In our view the most significant inadequacy in arrangements relating to energy supply in Australia is in consumer advocacy and public interest advocacy. We compare very unfavourably with the USA and the UK.

We believe there is a fundamental need for advocacy:

- to promote consumer and public welfare interests in the development and review of regulatory instruments;
- to scrutinise licensing processes; and
- to thoroughly test issues that may come before regulators, particularly in

relation to pricing and standard of utility services.

Strong advocacy of the interests of the most vulnerable consumers, those living in disadvantage, is critical.

We note that the MCE (Communiqué 4 November 2005) has decided that consumer advocacy is to continue to be supported by means of grants managed by a national advocacy panel. We do not readily see how this system could allow a continuing central body of expertise to be developed to provide the type and level of advocacy required in the context of a national regulatory system.

There are a number of areas of public policy that need to be co-ordinated with policy on energy supply particularly policy for poverty alleviation, sustainability policy and industry development policy. Under current arrangements there is opportunity for such co-ordination at state / territory level. Ideally any new arrangement which results in a policy and rule making and regulation shift to the national level should not make such co-ordination more difficult. We think satisfactorily achieving this would be far from straight forward and more attention to this is needed.

It is our view that there are quite significant special characteristics of both energy supply and consumption that warrant substantial specific market regulation and this is reflected in the various consumer protection codes currently operating in Australian jurisdictions.

We consider mandatory codes of conduct / practice an essential component in systems for achieving high standards of performance of utility companies and for the effective operation of complaint handling systems. Most jurisdictions have such codes. These codes reinforce *Fair Trading Acts* and the *Trade Practices Act* in relation to misleading or deceptive and unconscionable conduct and should also cover other matters.

For a code development and review process to be sound it is of course necessary to have strong and sustained consumer advocacy and to assist in ensuring that systems are effective to achieve code compliance.

Theoretically it may be possible to cover all of the special regulatory requirements of energy markets by adding energy market specific provisions to the *Trade Practices Act* and *Fair Trading Acts* and by mandating energy market codes under those acts or by making rules under the National Electricity Law or National Gas Law as and that licensing need only be used to regulate for technical and environmental.

The Gilbert and Tobin / NERA paper opines that as a matter of principle "licensing regimes should not be used as a device to impose legal obligations", but no authority is cited and no examples are given of problems that have arisen because of this use of licensing. Our view is that the test should be what works and experience in Australia and overseas, as far as we have been able to judge, is that this use of licensing does work. We suggest that it would be unwise to let go of it this kind of system without clear evidence of its shortcomings.

We agree with the Gilbert and Tobin / NERA paper that a regulatory regime should be as transparent and as simple as possible. We do not agree that a licensing system

is necessarily prone to opacity nor to rule proliferation and complexity. We do strongly suggest that any national licensing system should be quite open to scrutiny of stakeholder groups and the community at large. Moreover we think that there are good reasons to provide for appropriate processes of intervention.

For a national licensing system to operate effectively, and indeed to ensure avoidance of the kinds of problems the Gilbert and Tobin / NERA paper suggests it will be critical to have a well resourced consumer advocacy player with a high level of expertise and experience in the social economic and legal aspects of energy market regulation.

Compliance cannot be achieved without support for the system and the regulatory actors - government, industry and consumers.

A proactive regulator is the key element to achieving compliance, but it must have adequate powers. Sanctions are a crucial element and must be credible and sufficient and must be imposed in a timely manner. A range of sanctions are needed such as warning letters, compensation, meaningful monetary penalties, other appropriate orders (such as corrective advertising or the institution of a compliance program, suspension or termination of licences.

There should be guidelines on which to assess penalties such as whether the breach was inadvertent, through negligence, deliberate, whether there were previous contraventions, the amount of harm to the public, and the extent of benefit to the supplier.

In enforcing energy laws the ability of the regulator to accept written undertakings is important. There may also be a need to seek comment of stakeholders, particularly any national advocacy body. In general terms we believe regulators should provide timely and comprehensive details of enforcement activities. We expect there would often be resistance to this practice but we take it to be in the public interest for consumers to have access to this information.

We believe licensing has significant compliance advantages. There is no convincing evidence available that license systems have been or are barriers to entry nor that other approaches would deliver good compliance outcomes, including for codes for consumer protection, any more efficiently. There is thus no reason to depart from the license approach for a national energy market.

Compliance auditing / reporting is the main way that regulators in Australia go about ensuring compliance with licences, legislation, codes, etc. There is a requirement for regular reporting, particularly in terms of compliance with obligations relating to small customers. There is also commonly a requirement for utility companies to provide immediate advice to the regulator of any material breach.

Reporting requirements are supplemented in some jurisdictions by independent audits of companies with the reports being provided to the regulator.

The right to intervene is a common feature of US jurisdictions considered. We believe this is important for transparency and fairness in any regulatory process including the energy industry. We believe stakeholders should have the opportunity

for meaningful participation. This would be facilitated if processes for consideration of matters were transparent.

The need for access to expertise is very much tied in with the right to intervene. Consideration of energy matters often involves a high level of expertise. Some Australian regulators encourage consumer groups to be involved but recognise that input is limited by resources and the need for technical expertise. In order to make a meaningful contribution stakeholders need continuing and timely access to expertise and not just on an ad hoc basis. This aids in making processes more transparent and makes the regulator more accountable.

Regulators currently put information on compliance reports on their websites and issue publications. Provision of such information is becoming timelier. We support this and note that energy suppliers are often required to report material breaches to regulators as soon as possible. We believe it is also important that such matters be provided to the public in a timely manner and with the opportunity for input.

In general terms transparency will be assisted if companies view reporting as a valuable contribution to the company's efficiency and long-term success. Encouraging a strong reporting culture can be characterised as contributing to improving customer focus and the effectiveness of an organization.

Regulators have a part to play in terms of timely and comprehensive reporting of information that the community should be aware of and they should be proactive in encouraging companies to provide information to the community.

A key element of a good compliance culture in companies is a positive approach to complaints. This means they should make it as easy as possible for consumers to raise concerns. High profile agencies, as we have in the industry ombudsman schemes, are important in developing the right culture in companies and in giving consumers the confidence to bring forward complaints.

On balance we take the view that it is preferable for external complaint handling schemes to be non-statutory, and funded directly by the industry such as with the schemes in NSW, Victoria and South Australia. We believe the mechanism of requiring companies to belong to schemes by license condition has proved to be very satisfactory. It is of course crucial that the ombudsman / complaints authority is, and is perceived by the public as, independent of the industry.

We consider that regulators need to have a specific brief to protect the public interest. Perhaps there should be a provision in legislation that requires regulators to have regard to such things as the social impacts of their decisions, their consequences in terms of standards of quality, reliability and safety of services and the protection of consumers from abuses of monopoly power in relation to both prices and standards of service.

1. INTRODUCTION

1.0.1 On 20 July 2005 the Foundation for Effective Markets and Governance (FEMAG) was contracted by the Public Interest Advocacy Centre Ltd (PIAC) to provide advice on compliance arrangements appropriate for a system of licensing energy utility companies.

1.1 FEMAG

1.1.1 Our adopted mission is to enhance the welfare of the community by assisting in optimal application of the market mechanism and in the making of good governance so that development is equitable, peaceful, co-operative and sustainable.

1.1.2 FEMAG comprises experts from three main streams:

- former Commissioners and staff of Australian Competition and Consumer Commission;
- people with a background in the consumer movement, compliance, complaints and dispute resolution, governance and civil society; and
- academics with a special interest in competition, consumer and regulatory law and its administration.

1.1.3 FEMAG is a non-profit organisation. Its directors, members and any consultants it engages have a strong philosophical commitment to FEMAG's mission. We are based at the Australian National University in Canberra.

1.2 PIAC

1.2.1 PIAC is an independent, non-profit law and policy organisation that identifies public interest issues and works co-operatively with other organisations to advocate for individuals and groups affected.

1.2.2 In making strategic interventions on public interest PIAC seeks to:

- expose unjust or unsafe practices, deficient laws or policies;
- promote accountable, transparent and responsive government;
- encourage, influence and inform public debate;
- promote the development of law - both statutory and common - that reflects the public interest; and
- develop community organisations to pursue the interests of the communities they represent.

1.2.3 One of PIAC's policy projects is the Utility Consumers' Advocacy Program (UCAP) that is funded by the NSW Government. UCAP focuses on systemic and strategic issues affecting residential consumers of energy and water. Its policy development is assisted by a community-based Reference Group.

1.3 Background to this project

1.3.1 Following the 2002 Parer Report the Ministerial Council on Energy (MCE) initiated a further round of reform of the regulatory framework for the electricity and gas industries. This is designed to strengthen the national energy market in Australia and create further competition.

1.3.2 Two new national regulatory bodies have been established which will take over a number of the functions of jurisdictional regulators in electricity and gas – Australian Energy Market Commission (AEMC - the body responsible for rule making) and Australian Energy (AER – the regulator of the electricity market and electricity transmission networks). One aim of the MCE reform process is to replace the current state and territory based rules with uniform national regulation. A series of consultation papers have been released which examine options for a national approach to energy transmission, distribution and retail activities. These cover both economic and non-economic regulation.

1.3.3 In considering the options for reform the MCE has signalled its interest in the creation of a national system of licensing of energy distributors and retailers. It is expected this will be the subject of further consultation in 2005.

1.4 Project aims

1.4.1 In response to the MCE August 2004 consultation paper PIAC argued that a national approach to licensing for energy distributors and retailers must include effective provisions for compliance and enforcement. In particular, PIAC is concerned that a national licensing scheme be able to provide effective protection of consumer interests and promotion of consumer welfare. An important component of such a scheme will be the transparency of its operation and the public reporting of non-compliance. The Gilbert and Tobin / NERA Paper, released by the MCE since then, makes arguments in favour of reducing licensing to cover only technical standards and environment protection and largely relying on general law for consumer protection. The project has taken account of this significant shift.

1.4.2 PIAC intends to participate in further consultations around a proposed national system of licensing. Accordingly, PIAC wishes to gain a better understanding of:

- approaches currently employed in Australian jurisdictions for monitoring and enforcement of licence conditions imposed on utility distributors and retailers;
- how these approaches compare with those in the United Kingdom and some jurisdictions in the United States;
- what elements would comprise an effective approach to licence compliance and enforcement in a new national licensing system, particularly in relation to licence terms dealing with consumer protection and consumer welfare; and

- options for public reporting and disclosure of licence monitoring and enforcement activities.

1.4.3 PIAC has engaged FEMAG to provide this information. It has also expanded the terms of the research and is also seeking advice on elements of a regulatory regime beyond licensing that are needed to ensure effective protection of consumer interests and promotion of consumer welfare.

1.4.4 The expansion of the terms of reference has meant that to complete the project within the funding limits provided, some matters of detail have not been explored to the depth that FEMAG would have liked.

1.4.5 Funding for this project came from the National Consumers Electricity Advocacy Panel (NCEAP).

1.5 Conduct of project

1.5.1 The approach taken in preparing this report included:

- analysis of current Australian arrangements to licence compliance and enforcement;
- identification and brief research into possible precedents in other jurisdictions;
- some deeper research into specific jurisdictions with a view to identifying procedures and processes likely to be applicable in an Australian context;
- discussions with regulators, complaints handling bodies, utility companies and consumer groups on arrangements currently in operation; and
- discussions with a range of stakeholders and experts on the feasibility of other procedures and processes being introduced.

1.5.2 A list of jurisdictions considered, and bodies consulted, is set out at Attachment A.

2. PREAMBLE

2.0.1 It is an understatement to say that there are widely divergent views on public policy in relation to markets. Ideology often seems to play a greater role than empirical evidence in the debate.

2.0.2 It seems uncontroversial to suggest that determining whether or not to employ a market for the delivery of any particular good or service and determining any regulation of a market should be based on efficiency in serving the values and goals that a community (society / nation) forms and reforms and which are reflected through its political system.

2.0.3 Our view is that in some cases it will be more efficient to let a market run under only basic market regulation (mainly companies, consumer protection and competition) and to take measures outside the market to correct any negative effects it might have in respect the community's values and goals. Resources for such measures might come from general taxation or might well appropriately come from levies on the market in question. In other cases corrective programmes might be cumbersome and involve substantial transactions costs and thus could well be less efficient than direct market interventions. We think in terms of a spectrum of regulatory intervention - see box.

Spectrum of Regulatory Intervention

Essential regulatory requirements:

- basic companies;
- consumer protection; and
- competition regulation.

However, where:

- access to goods or services is essential to survival or to the sound functioning of a just or fair society; or
- consumers could be exposed to risks to health or safety or to financial risks

there is also a need for market specific regulation, namely:

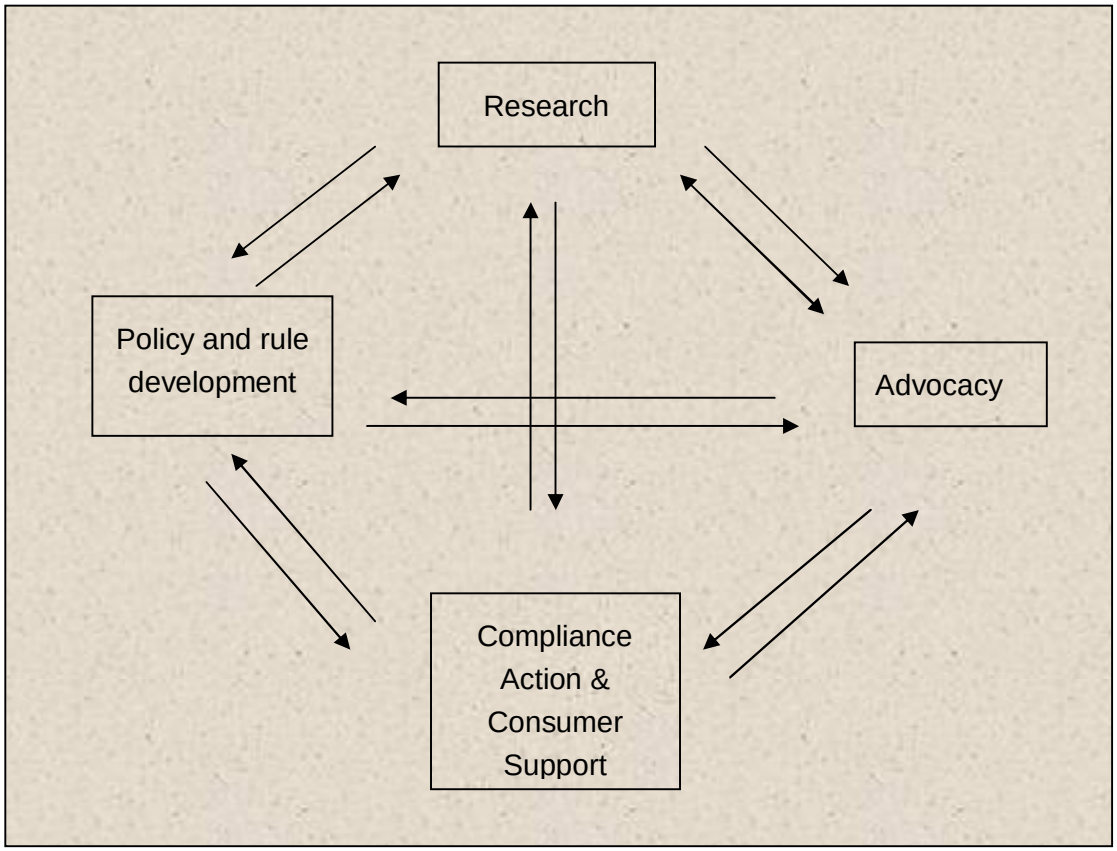
- market substituting mechanisms;
- information standards;
- product standards;
- licensing;
- product bans.

The more important products are or the greater the risks then the tighter is the regulation that is warranted.

2.0.4 Our departure point in undertaking this project was the assumption that our community sees it as incumbent upon the state to ensure provision of or equitable access to a range of goods and services that are essential for its citizens' survival, health and well-being, self-fulfilment and full and dignified community participation. We take this range to include security, education, and health services and the utilities services of energy, water and sewerage, communications and public transport.

2.0.5 Clearly we utilise, or partly utilise, markets to deliver some of these goods and services, but not others. When markets or quasi-markets are utilised, because there are special characteristics on either or both the supply and demand sides and often externalities involved, interventions beyond basic market regulation are nearly always required. Ensuring equitable access over time and as social, ecological, technological and economic conditions change requires these regulatory arrangements to be adaptable. This means that care must be taken to provide for the weakest voices to be heard in the adaptation process.

2.0.6 In our experience when a market is to be employed to deliver goods or services to the community four broad interdependent elements must be involved for delivery to be equitable and efficient:



2.0.7 The main functions that need to be performed in respect of these four elements are as follows:

Research and education and information

- research and analysis of the market sector – both supply and demand sides;
- collection of data on the performance of the market sector;

Advocacy

- producer advocacy
- consumer advocacy
    - for policy and/or regulatory reform
    - regulatory decisions – tariff approvals etc;
    - for improved administration of regulation;
    - individual cases;
    - for improvements in companies' services
    - public interest advocacy for sustainability
  - for ordinary consumers
  - in relation to or for disadvantaged consumers

Policy and rule making

- policy development
- rule/regulatory instrument development and review;
- review and reform of regulation of the market sector;

Compliance action & consumer support:

Education, information, compliance programmes, rule enforcement, dispute resolution

- education and dissemination of information to consumers;
- education and dissemination of information to suppliers;
- industry association and company level programmes for compliance with regulation and for continuing consumer service improvement
- administration of general regulation for consumer protection and competition and for worker protection and environment protection;
- administration of market sector regulation;
- collection of complaints/disputes;
- independent mediation/conciliation and arbitration of complaints/disputes; and
- management of particular cases (e.g. hardship cases);

2.0.7 There are many options in terms of allocation of performance of these functions to different agents and many may be undertaken by more than one stakeholder in a market.

2.0.8 While we see all these functions as integral to the effective operation of a market, some are not within the scope of this project and are not considered in detail

in this report.

2.0.9 While broad agreement can usually be achieved amongst a range of views on many of these functions, the resources they consume and the manner in which they should be performed, there is often controversy on advocacy.

2.1 Advocacy

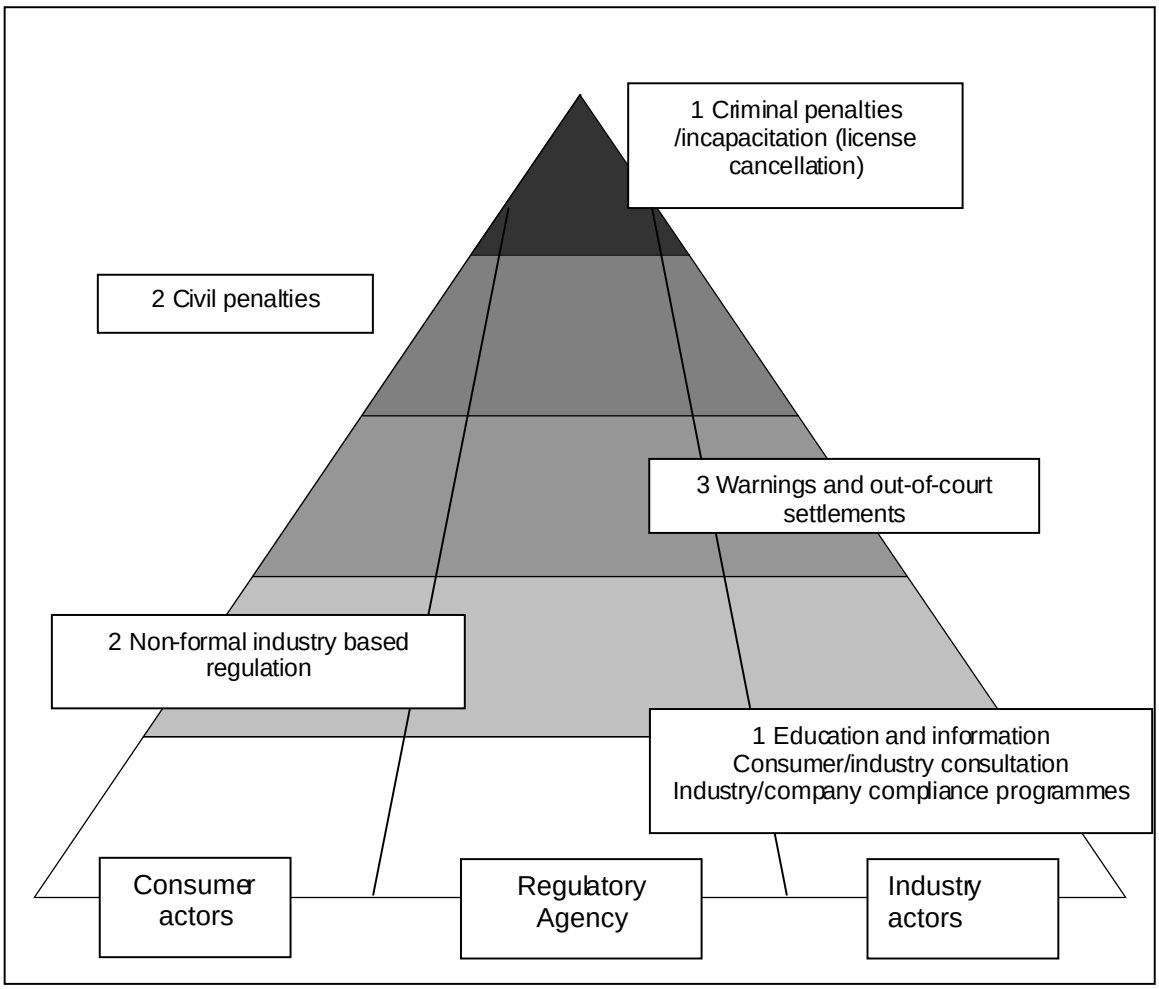
2.1.1 While the research on a market might be comprehensive, policy and rule makers and regulators are likely to hear more about aspects and perspectives relevant to the interests of those whose livelihoods are involved in the market than about aspects and perspectives relevant to the interests of consumers or to the public interest. This is of course to do with the costs and benefits of advocacy. In the extreme, policy and rule makers and regulators can be captured by producer interests.

2.1.2 Getting citizens in general to advocate their interests or pay up to have their interest represented as consumers of a good or service or beneficiaries of a clean environment is much harder. The benefits of participation in advocacy are often seen to fall well below the costs. This is largely due to the "collective action problem" (Mancur Olson, 1965). So, where public policy and regulation should reflect a diffuse public interest, members of the community at large will, not unreasonably, question why they should devote a lot of time and energy with everyone else "free riding" on their efforts.

2.1.3 Of further concern is the fact that many people in disadvantaged groups in the community are in any case disempowered in advocacy. For a range of reasons they are unable or find it very difficult to engage in participation processes available.

2.2 The regulation/compliance pyramid

2.2.1 Researchers and practitioners in regulation and compliance often find it useful to employ the regulation / compliance pyramid model. The diagram below depicts a typical pyramid. The number of levels and the activities at each level will vary from regulatory regime to regulatory regime. The idea of course is that the bulk of effort and activity occurs at the base of the pyramid and this diminishes towards the top.



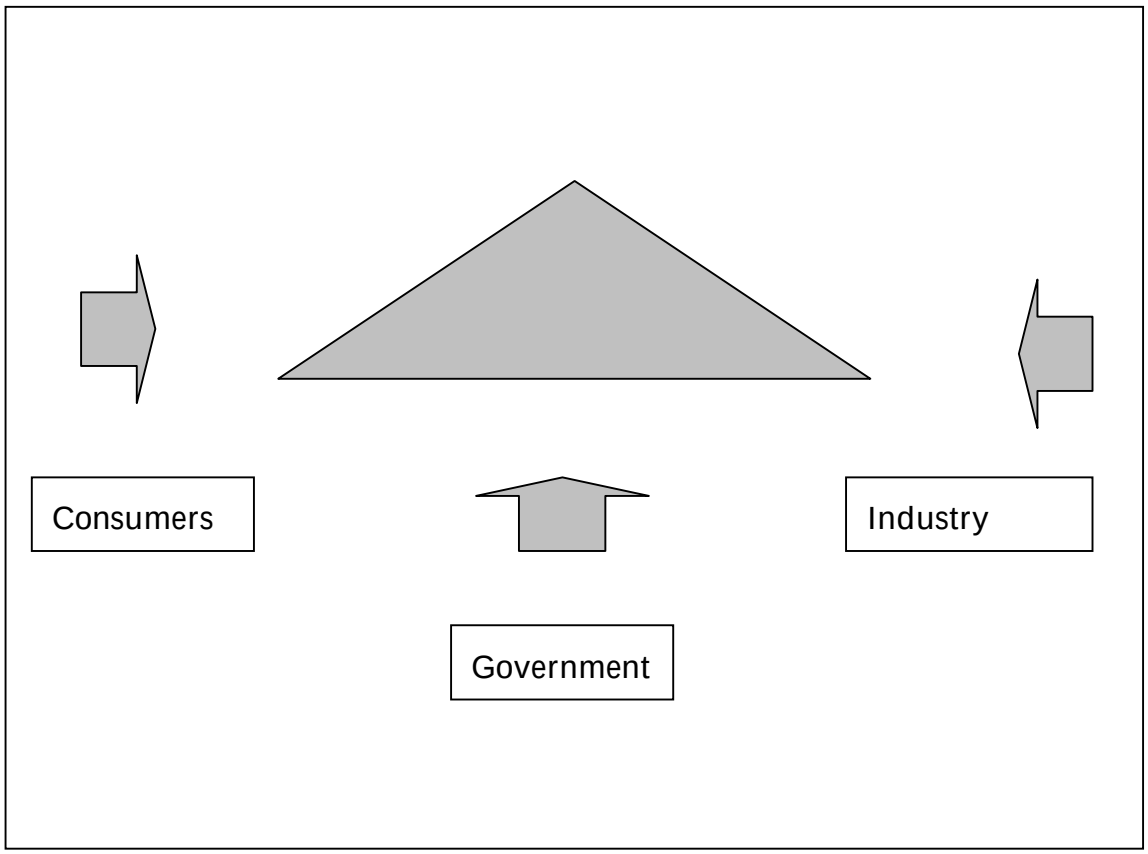
2.2.2 Under all regulatory regimes there is considerable scope for both consumer actors and industry actors to contribute at the base level. Individual consumers can contribute by drawing a company's attention to marketplace problems. Industry associations and companies and can do much in the way of compliance programmes and complaint handling. Consumer organisations work with industries and companies and can distribute information to consumers.

2.2.3 In some regulatory regimes there is scope for both consumer and industry actors to contribute right up to the top level. The effect of this contribution from consumer and industry actors is of course to broaden the pyramid, to increase the activity and the lower levels, thus reducing the need for activity at the higher levels and making the regulatory regime more effective and efficient.

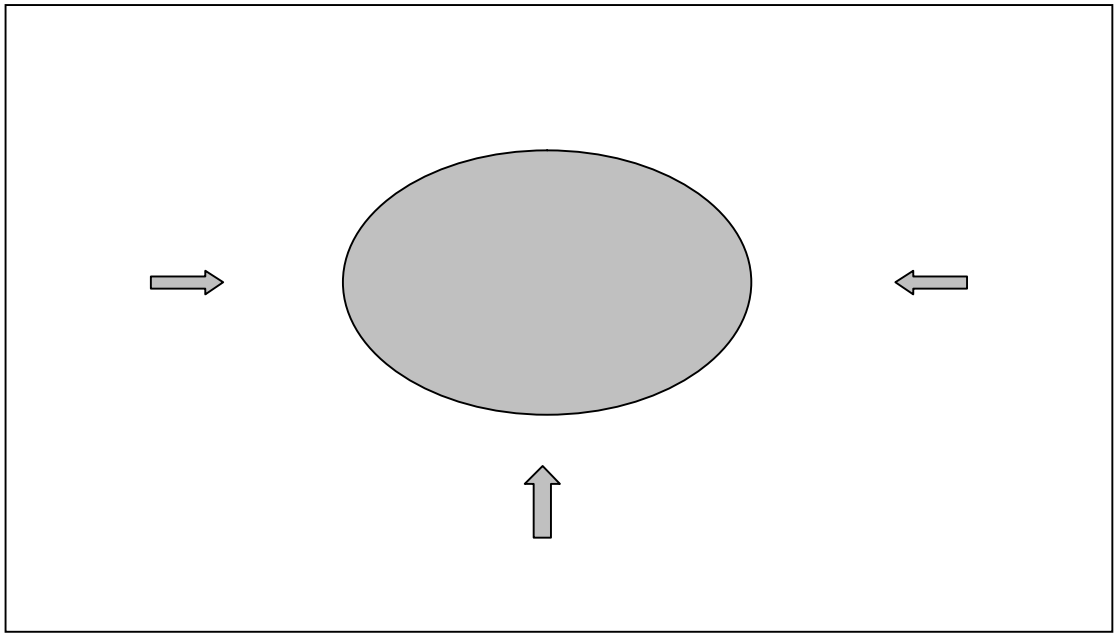
2.2.4 For regulatory regimes to be fully effective the top level has to be and be seen to be real. This does not mean it has to be utilised, but a real potential for utilisation is necessary. In he end the government of the day must make it clear that it is prepared to back up the regulatory agency involved.

2.2.5 With clear government commitment and support and with clear commitment and support from both industry and consumers (or citizens in respect of public interest issues or workers in respect of worker protection) the regulatory / compliance

pyramid can be at its broadest and most effective and efficient as depicted in the diagram below.



2.2.6 Where tripartite commitment is weak or lacking the pyramid structure collapses and the regulatory agency is limited to relatively ineffectual activity in the middle levels as represented in the diagram below.



3. REVIEW OF CURRENT ARRANGEMENTS FOR LICENCE COMPLIANCE AND ENFORCEMENT WITHIN AUSTRALIAN

3.0.1 Set out in Table 1 below is a list by state / territory of regulators and complaint handling authorities.

Table 1
Statutory regulators and complaint handling authorities: by jurisdiction

	Regulator	Complaint handling authority
New South Wales	Independent Pricing and Regulatory Authority	Energy and Water Ombudsman NSW
Victoria	Essential Services Commission (Victoria)	Energy and Water Ombudsman (Vic) Ltd
Queensland	Director General of Department of Energy Queensland Competition Authority	Energy Complaints Protection Office
Western Australia	Economic Regulatory Authority	Energy Ombudsman
South Australia	Essential Services Commission of South Australia	Energy Industry Ombudsman (SA) Ltd
Tasmania	Office of the Tasmanian Energy Regulator	Electricity Ombudsman
ACT	Independent Competition and Regulatory Commission	Essential Services Consumer Council
Northern Territory	Utilities Commission of the Northern Territory	Territory Ombudsman
Commonwealth	Australian Energy Regulator, Australian Energy Market Commission, Australian Competition and Consumer Commission	

3.1 New South Wales

Independent Pricing and Regulatory Authority (IPART)

3.1.1 IPART is the independent regulator for NSW for water, gas, electricity and transport services.

3.1.2 Its functions are conferred by legislation and by rules and access regimes established by legislation. Some of its core functions are set out below:

- to regulate revenues or prices of electricity networks under the National Electricity Code and electricity legislation;
- to regulate natural gas pricing and third party access to gas networks;
- to administer the licensing or authorisation of water, electricity and gas utilities, and to monitor these utilities' compliance with their licence or authorisation.

3.1.3 Among its listed purposes and goals are to:

- protect consumer by ensuring the quality and reliability of regulated services and by considering the social impacts of its decisions; and
- monitor the way utilities comply with their respective licence obligations.

3.1.4 The legislation under which IPART is constituted stipulates that in relation to the content of its determinations and recommendations, it is not subject to control or direction of any government minister. It also :

- ensures the entire regularity and licensing processes are transparent;
- consults widely with all stakeholders; and
- publicly reports compliance.

3.1.5 *Compliance* – There is a requirement for retailers to develop and maintain internal systems capable of effectively managing compliance with their licences. IPART developed in new compliance regime in 2002/03 and has comprehensive compliance reporting arrangements. It also requires companies to undertake compliance audits with the results of those audits being provided to IPART. The audits look particularly at compliance with obligations relating to small customers. It believes its processes are best practice.

3.1.6 To facilitate the common administration of the electricity and gas regimes, IPART has produced a series of reporting manuals, one for each licence and authorisation type. These manuals explain IPART's approach to compliance monitoring and clarify reporting requirements for holders of NSW licences/ authorisations.

3.1.7 IPART also conducts periodic compliance audits. The scope and timing of these depend on the results of previous compliance audits and each business's licence compliance history. New licensees may also be audited in the first six months of operation to confirm that necessary systems have been established to ensure licence compliance.

3.1.8 Since the introduction of the new regime IPART has been concentrating on

developing a culture of compliance in the industry. It monitors trends in complaints lodged with the industry ombudsman and monitors media reports with a view to picking up systemic issues.

3.1.9 *Investigation powers* – A retailer must comply with IPART requests for information, documents and evidence for an investigation or report. A retailer must also furnish information to allow the Minister to assess if it is complying with its licence conditions.

3.1.10 *Sanctions* - The Minister is the enforcer (on the recommendation of IPART). Sanctions available are cancellation of a licence for knowingly contravening the law or licence condition (after reasonable opportunity to make submissions) or monetary penalty. (IPART may also require particular action by licence holder).

3.1.11 *Complaints* - A retailer must comply with any decision of the industry ombudsman relating to a small customer. The retailer must also comply with any relevant guidelines / codes established by the Minister.

3.1.12 *Community consultations* – A retailer must prepare a charter governing the constitution and procedures of a customer consultation group established by the retailer. The charter must be submitted to the Minister for approval. A retailer must have at least one customer consultative group to act as a forum for consultation with consumer groups, low-income households, rural / remote consumers, domestic customers and industrial / commercial customers.

3.1.13 *Marketing Code* – A retailer must comply with this. It specifies the minimum level and quality of information to be provided to small retail customers. Customer contracts as provided for in the legislation contain service standards that include standards that deal with quality of services and response times to customer enquiries.

3.1.14 *Disconnection* – A retailer cannot disconnect supply to a small customer without going through the processes provided in the customer contract.

Energy and Water Ombudsman NSW

3.1.15 The Energy and Water Ombudsman NSW (EWON) provides a free and independent way of resolving consumer complaints about electricity and gas suppliers in NSW and member water providers. The Ombudsman is independent and able to make decisions based on what is fair and reasonable in the circumstances of each complaint. The scheme is available for all electricity and gas consumers in NSW. The Ombudsman can advocate on an issue but cannot advocate for an individual or class of customers.

3.1.16 The EWON Board has accountability and responsibility for the formal administration of EWON under the Corporations Law and exercises final authority in relation to the financial affairs of it. The Ombudsman is responsible for the managing the day-to-day operations of the office and its overall performance. There is also a Council to oversight the EWON scheme and to maintain the independence of the Ombudsman. It also makes recommendations to the Board in regard to

budgets.

3.2 Victoria

Essential Services Commission

3.2.1 The Essential Services Commission (the Commission) is the independent economic regulator established by the State Government of Victoria, to regulate prescribed essential utility services supplied by the electricity, gas, water and sewerage, ports, grain handling and rail freight industries and aspects of the insurance industry.

3.2.2. Its primary objective is to protect the long-term interests of Victorian consumers with regard to the price, quality and reliability of essential services.

3.2.3 The Commission makes price determinations and approves prices for various essential services provided by natural monopoly utility businesses using a variety of regulatory-based methodologies, including CPI-X incentive-based regulation, compliance with pricing principles and other approaches.

3.2.4 It sets standards for natural monopoly services through enforceable codes of conduct, and sets financial and other incentives for regulated businesses to meet key performance standards.

3.2.5 Other functions of the Commission include:

- ensuring that utility customers have an effective consumer protection framework;
- monitoring, auditing and enforcing compliance with the regulatory obligations set out in licences and other statutory and regulatory arrangements and publishing reports on the financial and service performance of licensed businesses and
- imposing sanctions.

3.2.6 *Compliance* – The Commission has comprehensive powers to ensure compliance with the law and other obligations. A retailer must monitor its compliance with its licence. In relation to electricity a retailer must, on the request of the Commission, appoint an independent auditor to conduct an audit of the retailer's compliance under its licence and the reliability and quality of the information that the retailer is required to report to the Commission. The retailer must also comply with any relevant guideline in relation to audits (as too must the auditor).

3.2.7 In relation to gas a retailer must demonstrate its actual prospective compliance with any relevant standard required by the Commission and monitor its compliance with its licence and any relevant Order in Council, code or guidelines. It must also notify the Commission of any material breach and appoint an independent auditor to conduct audits of the retailer's compliance with its licence obligations.

3.2.8 *Investigation powers* – A retailer must provide to the Commission such information as the Commission may require.

3.2.9 *Sanctions* – The Commission may revoke a licence for non-compliance with Commission order or non-trivial licence breach. It considers it has strong powers of persuasion.

3.2.10 *Complaints* - A retailer must submit for approval and implementation a dispute resolution scheme that contains certain terms and conditions e.g. an ombudsman scheme. Complaints must be handled in accordance with Australian Standard 4269 and the Benchmark for Industry Based Resolution Schemes (released by the Department of Industry Science and Tourism).

3.2.11 *Energy Retail Code* – The Code reinforces the *Fair Trading Act* and the *Trade Practices Act* in relation to misleading, deceptive and unconscionable conduct and also addresses such matters as training for marketing representatives, internal dispute resolution processes, disconnections and auditing.

Energy and Water Ombudsman (Victoria) Ltd

3.2.12 The Energy and Water Ombudsman (Victoria) provides a free and independent service to resolve disputes between customers and their electricity, gas and water providers. The scheme is available to all Victorian customers of electricity, gas and water, including domestic and business users. The types of issues the Ombudsman can investigate and resolve include provision and supply, bills, credit and payment services, disconnection or restrictions, refundable advances and land / property issues.

3.2.13 Funding for the scheme comes from the scheme's industry members, on a 'user pays' basis, involving a combination of fixed and variable fees. This method of funding provides a financial incentive for members to reduce the number of complaints coming to EWOV, by resolving customer issues within their internal complaint handling processes.

3.2.14 Essentially EWOV was set up to handle complaints but it also has a responsibility to identify systemic issues from cases received and report them to regulators where appropriate. It also provides input to industry, regulatory and consumer forums and through its customer service policy development and research it contributes to a range of matters such as reports and reviews of the Essential Services Commission.

3.2.15 EWOV has a Board that is comprised of equal representation of industry members and community / consumer representatives, with an independent chairman. It is primary responsible for the business affairs and the property of EWOV, including corporate governance, the setting of budgets and major policy matters. Its structure ensures the independence of the Ombudsman.

3.3 Queensland

Director General of Energy

3.3.1 The Department of Energy regulates the gas and electricity industries. The

Director General is the regulator.

3.3.2 *Compliance, investigation powers* – A holder of a licence must provide annual and in some cases quarterly reports to the regulator to allow an assessment of compliance with statutory obligations. A retailer must provide the regulator, the Queensland Competition Authority or the Minister any information requested in relation to the retailer's activities or the sale or purchase of electricity. There is also a power to enter premises and seize information.

3.3.3 *Sanctions* – The Director General may suspend / cancel / vary a licence if the authority was obtained on basis of incorrect or misleading information, contravention of *Electricity Supply Act*, contravention of authority condition, or if the body is no longer a suitable person. The regulator can also impose a fine. These provisions have been used with fines imposed and in one case a licence was suspended.

3.3.4 *Complaints* – a retailer must comply with decisions of the regulator in regard to a dispute. Also a retailer must, if requested by the regulator, participate in development and comply with any relevant protocols, standards and codes. The Energy Consumer Protection Office (ECPO) – see below – undertakes these functions.

3.3.5 *Appeal* – There is provision for reconsideration and resort to the District Court for certain matters.

3.3.6 *Regional Electricity Councils* – Seven Councils have been established to ensure the concerns of Queensland consumers are communicated to the Department of Energy, Energex and Ergon Energy. ECPO also attends.

3.3.7 The Councils, comprising representatives of local communities provide a forum for regional Queenslanders to have their say on how the State's electricity industry is performing. Their role is to provide advice to the Boards of retailers and the Department on such issues as reliability of supplies, environment and vegetation management. Each Council has four meetings per year.

3.3.8 *The Electricity Industry Code* – This came into effect on 1 January 2005. The Code introduced guaranteed levels of service and performance for electricity distributors. The guaranteed service level scheme entitles domestic and small business consumers to rebates if they don't receive a satisfactory level of customer service. Rebates (generally of $40.00) are available for such things as appointments not being kept or if electricity is not connected (or reconnected) on time or if it is wrongfully disconnected or if there is not a timely response to loss of hot water. Rebates are also available if a consumer experiences more than a specified number of outages in a financial year or a single outage for a specified period of time.

3.3.9. The Code aims to ensure retailers meet electricity demand during peak periods. Retailers are also required to prepare annual network management plans to ensure reliable supply through on going maintenance and capital investment plans.

3.3.10 Minimum service standards have also been established. These relate to the average number and duration of power outages. Retailers have to report against

this.

Queensland Competition authority (QCA)

3.3.11 The QCA was created in 1997 to facilitate the implementation of national competition policy in Queensland. The QCA encourages public participation by way of submissions to publicly released reports and issues papers.

3.3.12 It regulates the prices of electricity services to ensure they are fair and reasonable. As part of this it has regard to quality of service provided to ensure service is not sacrificed for higher profits. It conducts five yearly reviews and requires the submission of Pricing Principles Statements (usually annually) that outline the objectives of and method for determining distribution prices. Public input is encouraged into the Principles and the QCA endeavours to balance business interests with broader community interest.

Energy Consumer Protection Office

3.3.13 ECPO is the primary dispute resolution service for Queensland energy consumers. It has been operating since 2000. Its operations have been recently expanded with the introduction in January 2005 of the Electricity Industry Code that provides for rebates to domestic and small business customers where retailers fail to comply with guaranteed standards of service. ECPO expect to handle some 2,500 complains over the next 12 months. It takes a very proactive role on consumer issues.

3.3.14 It provides a free and independent investigation and mediation service to electricity and gas customers. ECPO has branches in Brisbane, Rockhampton and Cairns.

3.3.15 Consumer must give retailers a reasonable opportunity to resolve the complaint before contacting the office. They can contact the office if they are dissatisfied with a decision or action by the energy supplier.

3.3.16 Electricity customers may also have access to independent mediators and arbitrators if they are not satisfied with ECPO's investigation. Arbitrators can make awards of up to $20,000 by way of compensation or other orders. Only a very small percentage of complaints go to arbitration. Some 60% are resolved by ECPO before a need for mediation or arbitration. Mediators and arbitrators are located throughout Queensland. Their services are free.

3.3.17 Utility companies must accept the rulings of arbitrators but customers are free to take matters further, for example, to the courts.

3.3.18 ECPO is funded by licence holders with the amount of funding being determined by the regulator.

3.4 Western Australia

Economic Regulatory Authority

3.4.1 The ERA has regulatory responsibility for gas, electricity, rail and water.

3.4.2 *Compliance* – A retailer is required to provide the ERA with a performance audit of specific performance criteria deemed a condition of licence

3.4.3 *Sanctions* – A retailer's licence may be cancelled if the retailer fails to comply with material licence condition, or has been convicted of three offences within period of three months punishable by fine of at least $10,000 or imprisonment of at least 12 months. A monetary penalty may be imposed by the ERA.

3.4.4 *Complaints* - There is a requirement for retailers to develop a complaints handling process and be a member of a complaints handling scheme.

3.4.5 *Code of conduct* – This deals with the marketing activities of electricity marketers and their representatives. It covers training for marketing representatives, provision of information to customers in relation to contracts, preventing misleading or deceptive or unconscionable conduct, disconnection and dispute resolution. The complaint handling and dispute resolution scheme must comply with Australian Standard 4269.

Energy Ombudsman of Western Australia

3.4.6. The Ombudsman can investigate and resolve disputes between customers and their electricity and gas retailers. It is an independent and free service available to all residential and business customers and has the right to make binding decisions in disputes between consumers and energy suppliers. It operates dispute resolution schemes approved by the ERA and is established under legislation.

3.4.7 It has entered into a Memorandum of Understanding with the ERA to allow the parties to consult.

3.5 South Australia

Essential Services Commission of South Australia

3.5.1 The Commission is the regulator of the gas distribution system and electricity.

3.5.2 Amongst other things it is responsible for compliance, pricing and access.

3.5.3 The primary objective for the Commission is to protect the long-term interests of consumers with respect to price, reliability and quality of supply of essential services such as gas and electricity.

3.5.4 *Compliance* - The Commission monitors closely the performance of licensed electricity and gas entities, as well as monitoring the performance of the electricity and gas retail markets. A retailer must monitor and report to the Commission its compliance with the Energy Retail Code and a range of other codes and minimum service standards and notify the Commission within 3 days if it commits a material breach of certain codes and rules.

3.5.5 The Commission has issued guidelines on the performance statistics it requires entities to report routinely, and the manner in which entities report compliance with the various Codes issued by the Commission. The key documents for reporting this material are the Annual Performance Reports published in November each year.

3.5.6 A retailer is required to comply with any code that relates to the provision of comparative pricing information.

3.5.7 *Investigation powers* – Distributors and retailers must provide the Commission with such information as it requires.

3.5.8 *Sanctions* – The Commission may cancel or suspend a licence if the licence was obtained improperly or in the case of a material contravention. A number of lesser sanctions such as warning notices and injunctions are also available.

3.5.9 *Complaints* – A retailer must deal with customer disputes in accordance with Retail Energy Code except as otherwise approved. Unresolved complaints must go to the industry ombudsman.

3.5.10 *Energy Marketing Code* – This sets out general conduct standards that a retailer must comply with including a written disclosure statement, standards in relation to misleading and deceptive conduct, the harassment of consumers, the use of plain language and making comparisons with other retailers. The code also covers disconnection standards and dispute resolution. There is also a Price Disclosure Code.

3.5.11 *Disconnection* – A retailer must comply with the customer's contract or the Energy Retail Code in discontinuing supply.

3.5.12 *Appeal/reconsideration* - There is a right to apply to the Commission for reconsideration of its decisions (in relation to licensing refusals, price determinations and release of information) and then a right of appeal to the District Court.

Energy Industry Ombudsman (SA) Ltd

3.5.13 The Energy Industry Ombudsman provides a free and independent service to resolve disputes between customers and their electricity and gas providers. The Ombudsman is independent and able to make decisions based on what is fair and reasonable for each complaint. The types of issues that can be investigated include provision and supply, billing and credit management, disconnections, access to property and behaviour of company staff, contractors and agents.

3.6 Tasmania

Office of the Tasmanian Energy Regulator

3.6.1 The Office is the independent economic, technical and safety regulator for gas and electricity. It is co located with the Government Prices Oversight Commission and shares staff. The regulator is also the Director of Gas

3.6.2. The regulator has a duty of administrative fairness and must not unfairly discriminate between energy companies, customers and other persons.

3.6.3 The regulator is statutorily independent of Ministerial Direction in relation to electricity but the *Gas Act* provides for the Minister to give directions to the Director of Gas in respect of his functions other than licensing.

3.6.4 *Compliance* – A retailer must develop and submit a compliance plan every two years. A retailer must also notify the regulator of any breach of the Act, regulations, Tasmanian Electricity Code or licence as soon as it becomes aware of it and provide the regulator with information in relation it requires in relation to the breach. It must provide an annual report to the regulator in relation to performance standards.

3.6.5 *Investigation powers* – A retailer must provide the regulator with information as is relevant to the Regulator's functions.

3.6.6 *Sanctions* - a licence may be cancelled (after consideration of any submission of the retailer) for contravention of the *Electricity Supply Industry Act/Gas Act* if in the regulator's opinion the contravention is serious.

3.6.7 *Complaints* – A retailer must develop and submit a customer service plan (relating to service standards). In an annual report to the regulator a retailer must provide information in relation to performance standards, indicators and targets and a quarterly report in relation to customer service plan performance indicators.

3.6.8 *Appeal* – a licensee may apply to the regulator for reconsideration of imposed sanctions and may then appeal to Minister. In relation to gas the Minister may refer an appeal to the Resource Management and Planning Appeal Tribunal.

Electricity Ombudsman

3.6.9 The Electricity Ombudsman of Tasmania provides an independent, impartial means of investigating complaints from consumers of electricity against electricity companies. The Ombudsman has jurisdiction under the *Electricity Ombudsman Act 1998*.

3.6.10 The Ombudsman looks at the rights and responsibilities of both the complainant and the entity in the investigation of a complaint. The Ombudsman makes decisions based on current law and what is fair and reasonable in the circumstances. Following an investigation, there is the possibility the Ombudsman may make an award against the electricity entity. The service is cost free to the complainant.

3.7 A.C.T.

Independent Competition and Regulatory Commission

3.7.1 The Independent Competition and Regulatory Commission (the Commission) is a statutory body set up to regulate prices, access to infrastructure services and other matters in relation to regulated industries and to investigate competitive

neutrality complaints and government-regulated activities. The Commission also has responsibility for licensing utility services and ensuring compliance with licence conditions.

3.7.2 The Commission is required by the *Independent Competition and Regulatory Commission Act 1997* to consider a wide range of issues in determining its views. While many of the issues the Commission considers are financial and economic in nature, there is a strong element of social and environmental concern in the Commission's inquiries. For example, in all its inquiries that involves Section 20 of the ICRC Act, the Commission is required to consider:

- protection of consumers from abuses of monopoly power in relation to both prices and standards of service;
- standards of quality, reliability and safety of services;
- principles of ecologically sustainable development; and
- social impacts of decisions.

The Commission tries to involve community groups as much as possible.

3.7.3. *Compliance* - A retailer must monitor its compliance with the licence and other instruments and notify the Commission of a material breach as soon as practicable. A retailer must report annually on its compliance and make a summary of that annual report available to the public. Reports are required by October each year and it is expected they will be put on the Commission's web site by December. The Commission is moving to require independent auditing. There is a requirement for a compliance plan to be in place for new entrants.

3.7.4 *Investigation powers* – A retailer must comply with any reasonable requests of the Commission.

3.7.5 *Sanctions* – Sanctions available are revocation and suspension of a licence. Revocation may be imposed in the case of two or more offences in 5 years against the *Utilities Act* provided the contraventions were material. (A licensee must be given reasonable opportunity to make submissions.) Suspension is available for breach of licence condition provided the Commission does not consider it material and it is remedied in a timely manner. There is provision for penalties.

3.7.6 *Consumer Protection Code* – The purpose of the code is to:

- outline the basic rights of a customer or consumer;
- set out the circumstances where a utility can interrupt, restrict or disconnect supply;
- outline particular obligations that a utility must meet in dealing with customers and consumers;
- outline marketing obligations that a marketer has in relation to marketing; and
- set out the provisions that a utility must give in its customer contracts for the provision of services.

3.7.8 Essentially it deals with the marketing of electricity supply services. A marketer must not engage in harassment or coercion of a customer or make false or misleading representations. It also sets out certain duties of the marketer such as identification and explaining the purpose of the contact. The code requires the utility to develop, maintain and implement procedures for complaint handling and dispute resolution. The procedures must comply with the Australian Standard.

Essential Services Consumer Council

3.7.8 The Council is established under the *Utilities Act 2000*.

Its functions are to:

- facilitate resolution of complaints;
- ensure as far as possible that utility services continue to be provided to persons suffering financial hardship;
- protect rights of customers and consumers under the Act; and
- advise the Minister and the Commission on any matters relating to the Council's functions.

3.7.9 It has four particular areas of responsibility:

- managing client hardship cases;
- assisting in the resolution of issues and complaints;
- adjudicating complaints; and
- addressing systemic issues.

3.8 Northern Territory

The Utilities Commission of the Northern Territory

3.8.1 The Utilities Commission is the independent agency that oversees declared regulated industries. Amongst other things the Commission is responsible for fair and efficient market conduct and the prevention of the use of market power. It is located within the Northern Territory Treasury but it undertakes its specific statutory powers and considerations independently of Treasury. The Commission is a body corporate. The Commission is also responsible in water and sewerage including the issue of licences and standards of service.

3.8.2 Its object is:

> 'to create an economic regulatory framework for regulated industries that promotes and safeguards competition and fair and efficient market conduct or, in the absence of a competitive market, that promotes the simulation of competitive market conduct and the prevention of the misuse of market power.'

3.8.3 S.14(3) of the *Electricity Reform Act* provides for the issue of a licence for electricity generation, distribution and retail. The Minister may grant exemption from certain requirements of the Act.

3.8.4 S92 of the *Electricity Reform Act* provides for standards of service.

3.8.5 The Commission has issued a draft standards of service code.

3.8.6 *Compliance* – A retailer must undertake an annual independent audit of its operations and compliance with its obligations under the licence and other relevant regulatory instruments and results must be reported to the Commission. A retailer must notify the Commission if it becomes aware of any material breach of its licence or applicable regulatory instruments and lodge an annual report with the Commission containing information notified by the Commission.

3.8.9 *Sanctions* – The Commission may cancel or suspend a licence obtained improperly, or if there was a material contravention of the licence or the *Act* or regulation.

3.8.10 *Complaints* – A retailer must establish and comply with approved procedures to deal with customer consultation or enquiries for non-contestable customers.

3.8.11 Appeal – A retailer may apply to the Utilities Commission for reconsideration. It may then appeal to the Supreme Court (in the case of bias or material misinterpretation of facts).

3.9 Commonwealth

Australian Energy (AER)

3.9.1. The AER is established under the *Trade Practices Act* 1974 (TPA) and is responsible for enforcement and compliance for electricity and gas wholesale and transmission in the National Electricity Market (except for gas transmission in WA). It has assumed Australian Competition and Consumer Commission (ACCC) electricity and gas transmission regulatory functions and National Electricity Rules Administrator electricity regulatory functions including monitoring the electricity spot market and ensuring compliance with the National Electricity Rules. A state / territory energy law may confer powers or functions or impose duties on the AER for the purposes of that law.

3.9.1 The AER is responsible also for enforcing the National Gas Code and has specific consultation obligations with consumer and industry bodies.

3.9.2 It will be responsible for regulation of distribution and retailing (other than retail pricing) by 2006 although any jurisdiction may opt to transfer retail pricing and will exercise powers under an agreed national energy legislative framework, including the National Electricity law and the National Electricity Code.

3.9.3. On 1 July 2005 the AER assumed NECA's responsibility for compliance, monitoring and investigating alleged breaches of the National Electricity Law and the National Electricity Rules. The AER may undertake detailed investigations of specific market events or unusual market behaviour. It makes reports of its investigations available on its web site. It has sole responsibility for instituting proceedings.

3.9.4 Criminal proceedings may be instituted for various breaches and a civil

penalty may be imposed.

3.9.5 The AER is able to seek remedies in the state or territory supreme court of the relevant NEM jurisdiction, or the Federal Court. The AER may apply to the court for an injunction where a person has engaged in, is engaging in or is proposing to engage in conduct in breach of the National Electricity Law, the Regulations, or the Rules.

3.9.6 The AER will have the power to apply to a magistrate for the issue of search warrants.

Australian Energy Market Commission

3.9.7 The AEMC is established under the *Australian Energy Market Establishment Act 2004* and came into operation on 1 July 2005. Under that *Act* it has rule making powers, market development and other functions conferred under the National Energy Laws. Its responsibilities relate to electricity and gas transmission and distribution networks and retail markets (other than retail pricing).

3.9.8 The gas legislative package will transfer all the National Gas Pipelines Advisory Committee and Code Registrar functions to the AEMC. Rule making functions in relation to gas will also be transferred.

Australian Competition and Consumer Commission

3.9.9 The ACCC is responsible for approving mergers, access codes and undertakings, granting authorisations and for investigations and prosecuting contraventions of the TPA (e.g. for consumer protection contraventions).

3.9.10 The ACCC will continue to be responsible for certain matters involving energy including mergers, access codes and undertakings and granting authorisations and for investigating and where necessary prosecuting possible contraventions of the TPA.

3.9.11 The ACCC may take civil proceedings and in some cases criminal proceedings for possible breaches of the TPA. It can seek penalties, injunctions and other orders including damages. It can also bring representative actions and the law provides for private right of action and for groups of individuals to take representative or class actions.

3.9.12 The TPA also allows the ACCC to take action in the Courts for enforcement of written undertakings accepted in the exercise of the Commission's powers under the Act.

3.9.13 There are broad powers under the TPA for the ACCC to obtain information and documents in relation to possible contraventions of the law.

3.9.14 Under the ACCC's adjudication functions the Commission provides an open and transparent process for consideration of applications. When an authorisation application comes to the Commission for considerations it seeks submissions from all

parties who have or may have an interest. The application and any submission, subject to the exclusion of commercially sensitive information, is placed on a public register and on the Commission's website.

3.9.15 When considering an application the ACCC first issues a draft decision (to the applicant and all interested parties). Anyone dissatisfied with the decision can call a conference with the Commission to which all interested parties are invited. Finally the Commission issues a final decision. That decision may be appealed to the Australian Competition Tribunal.

3.10 Other regulators

State/Territory Offices of Fair Trading

3.10.1 These are responsible for enforcement of *Fair Trading Acts*. These mirror the consumer protection provisions of the TPA.

4. REVIEW OF ENERGY LICENCE OBLIGATIONS AND LEGISLATIVE REQUIRMENTS OF SELECTED OVERSEAS JURISDICTIONS

4.0.1 Jurisdictions and bodies selected for consideration are as follows:

- United Kingdom – Office of Gas and Electricity Markets (OFGEM), the Gas and Electricity Consumer Council (Energywatch);
- New Zealand - Electricity Commission, Electricity and Gas Complaints Commissioner, Powerswitch;
- Arizona – Arizona Corporation Commission; Residential Consumer Utility Office;
- Illinois – Illinois Commerce Commission, Citizens Utility Board;
- Maine – Public Utilities Commission, Office of the Public Advocate;
- Ohio – Public Utilities Commission; and
- Oregon – Public Utilities Commission, Citizens Utility Board.

4.1 United Kingdom

The Office of Gas and Electricity Markets - OFGEM

4.1.1. OFGEM is the UK's electricity and gas regulator. Its role is to protect and advance the interests of consumers by promoting competition where possible and through regulation only when necessary. It specifically regulates those businesses that cannot be opened to competition or where competition is not established. It aims to ensure vulnerable consumers share fully in the benefits of competition.

4.1.2 It operates under the direction and governance of the Gas and Electricity Marketing Authority that makes all major decisions and sets policy priorities of OFGEM.

4.1.3 OFGEM's budget is from gas and electricity licence holders

4.1.4. OFGEM has pricing controls.

4.1.5 It has enforcement powers to help achieve statutory duties – it can impose financial penalties. For example, OFGEM has imposed fines in last few years totalling some AU10 million for unsatisfactory practices relating to doorstep selling, the transfer of consumers to alternative suppliers and connections to the gas network.

4.1.6 There is an MOU with Energywatch. This secures cooperation, exchange of information, ensures consistent treatment of matters in both organisations

The Gas and Electricity Consumer Council - Energywatch

4.1.7 Energywatch is an independent watchdog for gas and electricity consumers – the champion for the consumer. It was established under the *Utilities Act 2000*. It is

an Executive Non Department Public Body supported by a grant-in-aid from the Department of Trade and Industry. The grant-in-aid is funded through licence fees collected by OFGEM. Its statutory functions and duties are laid down in legislation. Broadly, it may pursue 'any matter connected with the interests of consumers.' It has offices throughout England, Scotland and Wales.

4.1.8 The Energywatch Council consists of a non-executive part time Chair and a number of members. It appoints the Chief Executive Officer and is responsible for the proper conduct of business, strategic planning and monitoring performance.

4.1.9 Energywatch's functions are:

- making proposals or providing advice and information about consumer matters and representing the views of consumers on such matters;
- investigating and seeking to resolve consumer complaints;
- giving advice and information to Ministers, regulatory authorities, licence holders and any other body whose activities may affect the interests of consumers such as local authorities; and
- publishing information including on performance of licensed suppliers against any statutory service standards set by OFGEM, on complaints made against energy suppliers and publishing information that would be in the consumer interest.

4.1.20 It has a duty to have regard to the interests of individuals:

- who are dissatisfied or chronically sick;
- of pensionable age;
- with low incomes and on benefits, and
- residing in rural areas.

4.1.21 The Government appoints all members of the Energywatch Council.

4.1.22 Energywatch draws attention of interested parties to problems requiring action.

4.1.23 It takes up complaints by consumers who are experience difficulty in resolving problems with energy suppliers, works to investigate and resolve complaints – it refers matters to OFGEM where necessary. It (together with any designated consumer body) has the ability to submit a 'super-complaint' to OFGEM. Where it believes 'any feature, or combination of features, of a market in the United Kingdom for goods or services is or appears to be significantly harming the interests of consumers' it can lodge a complaint with OFGEM and it has 90 days to investigate it and prepare a report.

4.1.24 **It** oversees a voluntary code of practice for companies providing domestic electricity and gas price comparison services on the Internet.

4.1.25 Energywatch works to ensure consumers are aware of their rights and responsibilities. It can act as an advocate for consumers, provided consumers first attempt to resolve the issue with the supplier directly.

4.1.26 It works with companies initiating changes to their policies, processes and systems that will make them more responsive to consumer needs.

4.1.27 It does not have enforcement powers and has to rely on influence to achieve aims.

4.1.28 It asserts that compensation for all breaches of the Face to Face Marketing Code is necessary to increase consumer confidence and act as a driver to improve selling experience.

4.1.29 Energywatch's priorities are heavily influenced by enquiries and complaints e.g. recent analysis showed consumers faced billing problems, unsatisfactory selling practices, and the process of switching in the energy market. This led to major campaigns to tackle unsatisfactory selling practices and to improve billing standards. Energywatch co ordinates its activities with agencies and consumer groups and at the beginning of each financial year circulates for public comment a proposed work program.

4.1.30 It has also conducted research into consumer attitudes.

4.1.31 It asserts seven rights for energy consumers:

- access to warmth power and light;
- information – clear, accurate and up to date information, right to be protected against misleading marketing, information to enable them to use energy efficiently and safely;
- choice;
- representation – right to express their interests in the making of government policy and its implementation, right to expect companies will seek and consider their views;
- redress – to know what is happening and when things will be fixed, compensation, right to responsive regulation where markets fail to protect their interests;
- safety; and
- sustainability – to participate in shaping energy policy and to contribute to sustainable energy consumption.

4.1.32 There are two regional committees (for Scotland and Wales) to bring to the attention of Energywatch interests and concerns of local consumers. The Chair of each committee is on Energywatch's National Council.

4.1.33 Energywatch provides a programme on its website to assist consumers to choose the most appropriate energy supplier for consumers. It also promulgates a voluntary code to guide the conduct of organisations that provide consumers with services for providing domestic electricity and gas price comparison services on the Internet. These services take away the need for consumers to do their own price calculations. Services that are signed up to the code of practice must conform to nine requirements and are tested and monitored by **E**nergywatch to ensure that they are comparing accurate and up to date prices and that they are fully independent of any

gas or electricity supplier.

4.1.34 In November 2005, the Committee of Public Accounts of the UK House of Commons released a Report dealing with some aspects of the performance of Energywatch and Postwatch (the consumer service for the postal industry) setting out some criticisms of the bodies' costs and levels of consumer recognition.[1]

4.2 New Zealand

Electricity Commission

4.2.1 Until 1987 the electricity sector was completely regulated and publicly owned. Between 1987 and 2001 it was progressively deregulated with only 'light handed' regulation applying to weak competition areas, with the industry being largely self-regulating. In late 2000 the government released a Policy Statement that included a new governance structure including the establishment of an industry self-regulatory body – the Electricity Governance Board. However, when industry participants and consumer representatives were unable to finally agree on self-regulatory arrangements the government established the Electricity Commission**.**

4.2.2 The Commission is a crown entity established under the *Electricity Act* to oversee New Zealand's electricity industry and markets. It began operation in 2003.

4.2.3 In accordance with the *Electricity Act* and government energy policy, it is also responsible for governance of the market. The Commission's principal objective is to ensure that electricity is produced and delivered to all consumers in an efficient, fair, reliable and environmentally sustainable manner. It is also required to promote and facilitate the efficient use of electricity.

4.2.4 The Commission is governed by an executive chair and five other members appointed by the Minister of Energy.

4.2.5 The Commission inherited a set of electricity governance rules from the industry's self governing arrangements. The Commission is responsible to develop those rules.

4.2.6 The new rules are set out in an E*lectricity Governance Rulebook*. They take the form of a multilateral contract involving electricity generators, retailers, distribution companies, transmission companies and end consumers (the participants).

4.2.7 The rules set out the various market participant responsibilities and the Commission's duties and responsibilities. The Commission maintains the rulebook. Administration of the rules is a significant part of the Commission's day-to-day workload. It is responsible for ensuring market participants comply with regulations and rules. The Commission also grants exemptions and makes rule changes to enhance the workability of the market arrangements as necessary.

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[1] UK House of Commons Committee of Public Accounts, *Energywatch and Postwatch, Fourteenth Report of Session 2005-06,* The Stationery Office Limited, London 2005

4.2.8 The Commission has established an *EGR* Committee*. It is responsible for:

- initial fact finding on rule breaches;
- formal investigations into rule breaches;
- oversight of the informal settlement process;
- recommending to the Commission that alleged rule breaches be referred to the Rulings Panel;
- granting exemptions; and
- advancing minor rule changes.

(* EGR – Electricity Governance Regulations and Rules)

4.2.9 The Committee consists of the Chair of the Commission and one other member.

4.2.10 The Rulings Panel is being set up in accordance with the Electricity Governance Regulations (Regulations) to enforce the EGRs and apply penalties or other remedies for contraventions of the EGRs.

4.2.11 Participants are required (under regulations 62 & 63) to notify the Commission of a breach of the EGRs. An investigator must be appointed (under regulation 75) to investigate an alleged breach. Any participant that considers that it is affected by the alleged breach may become a party – this does not appear to include any consumer advocacy group.

4.2.12 Regulation 79 provides for search and investigation powers for the investigator and also for access to the premises.

4.2.13. The investigator must endeavour to effect an informal resolution of a matter under investigation (regulation 82).

4.2.14 The investigator must provide a copy of any settlement to the Commission and the Commission must either approve or reject the settlement (regulation 84). The terms of every settlement must be publicised. Should the Commission not approve a settlement, or should no settlement be possible, the Commission is required to make a decision on whether to lay a formal complaint with the Rulings Panel.

4.2.15 The Rulings Panel consists of five to seven members who have appropriate expertise to carry out the functions of the Rulings Panel. The Rulings Panel may make certain orders (regulation 107) including:

- a warning or reprimand;
- order for more stringent record keeping;
- civil penalty;
- compensation;
- termination or suspension.

4.2.16 Regulation 109 provides for a penalty of up to NZ$20,000 and sets out how the Panel may assess the penalty, for instance, on the basis of severity and impact and whether the breach was inadvertent, negligent, deliberate or followed previous

contraventions.

Electricity and Gas Complaints Commissioner

4.2.17. Principal powers and duties are:

- consider, at no charge to the customer, their complaint about the provision of services or about any other matter about which a complaint may be made under the scheme; and
- facilitate the resolution of such complaints in accordance with the terms of reference, code of practice and consumer dispute resolution protocol.

4.2.18. The Commissioner may look at almost any complaint about a member company but does not have the power to look into the amount companies charge for their services.

4.2.19 There are three main components of the scheme:

- electricity and gas codes of practice – every member company agrees to maintain the standards in the codes for all their dealings with consumers – the code covers consumer contracts (and what can be expected in a contract), quality of services provided, payment options, bonds on disconnections and reconnections, planned shutdowns, access to premises and consumer complaint resolution;
- internal complaints process - all member companies must have an internal complaints system and complainants must have used that scheme before approaching the Commissioner;
- Complaints Commissioner.

4.2.20 All members participating in the scheme are bound by the Terms of Reference and the Commissioner's decision and to follow the codes of practice.

4.2.21 The office of the Commissioner is funded by electricity and gas retail companies. The structure of the scheme is as follows:

- Council – consists of member companies and its role is to provide industry support for the scheme and, through its board, to make industry appointments to the commission;
- Commission - appoints the Electricity and Gas Complaints Commissioner, audits the scheme and monitors the rules, and
- the Commissioner.

4.2.22 Before a complaint can be considered by the Commissioner it must have gone through the company's in-house complaints service and have reached a deadlock or the company has taken longer than 20 working days to find a solution or the consumer is not satisfied with the proposed solution.

4.2.23 The Commissioner may require all information relevant to the complaint from both the company and the consumer.

4.2.24. If all parties cannot reach a resolution, the Commissioner can make a decision

that (s)he regards as fair and reasonable in the circumstances and that decision binds the company. Provisions regarding recommendations and awards are set out in the Terms of Reference.

4.2.25 An interesting aspect of the scheme is that a complaint may be pursued in the Court if it involves:

- an issue that may have important consequences for business; or
- an important or novel point of law.

4.2.26 The scheme has been in operation since 2002. Some 6,400 customers have called of which 4,400 were complaints. 830 investigations have been completed (of which 81% have been settled). 68% of complaints related to billing.

Powerswitch

4.2.27 Powerswitch is a service that allows a consumer to assess which power company and pricing plan best suits. It is produced by the Consumers Institute with assistance from the Ministry of Consumer Affairs and the Emily Carpenter Trust.

4.3 United States of America

4.3.1 Up until the 1990s the electricity industry had been a regulated monopoly industry but since then there has been a gradual process of introduction of competition. Some twenty-five states / districts have now adopted competition in their markets. The regulatory approaches of many of those states have been considered in the context of this paper. The approaches used in the following states were considered most relevant to this project:

- Arizona – Arizona Corporation Commission, Residential Utility Consumers Office;
- Illinois – Illinois Commerce Commission, Citizens' Utility Board;
- Maine – Public Utilities Commission, Office of the Public Advocate;
- Ohio – Public Utilities Commission, and
- Oregon – Public Utilities Commission, Citizens' Utility Board.

4.3.2 Volume 2 of this report sets out the obligations of jurisdictions considered in more detail.

4.3.3 Each of the Commissions regulates the electricity industry as well as other utilities such as gas, water and telecommunications. In some cases there are consumer divisions within Commissions to investigate and resolve consumer complaints.

4.3.4 The Commissions are generally responsible for approving any rate increases and service standards of utilities that fall within their jurisdiction. In some jurisdictions there is a formal hearing process for consideration of rate increases. There is also a formal process for hearing other matters that come before the

Commissions, such as complaints that remain unresolved after attempted mediation. Sometimes these hearings are presided over by an administrative law judge. In many cases the Commissions establish their own administrative laws and are able to impose sanctions such as fines and orders. The Commissions are generally responsible for monitoring and ensuring compliance with relevant rules and regulations. Many jurisdictions require annual reporting by utilities and the information is posted on their web sites.

4.3.5 There are also Citizens' Utility Boards or offices to provide a consumer voice. In some cases these also have a complaint-handling role and in most cases an important function of the Board or office is to test any application for utility rate increases. Some have a broad policy role and can intervene and institute their own proceedings in matters before the Commissions, Federal regulatory bodies or the courts. Boards are generally funded solely by membership contributions. They often cover a range of utility services.

5. COMPARISON OF AUSTRALIAN APPROACHES AND THOSE OF OVERSEAS JURISDICTIONS

5.0.1 Having regard to the terms of reference for this project it seems to us that the following issues are important in comparing current Australian approaches with those of overseas jurisdictions:

- Complaint and dispute gathering and resolution:
  - in house consumer complaint handling
  - external complaint handling
  - legal status of external complaint handling bodies
- Compliance and enforcement:
  - use of a licensing system or the general law
  - funding for complaint handling bodies
  - compliance obligations
  - information gathering powers
  - sanctions
  - right of appeal
  - private right of action
  - transparency / reporting
- Consumer and public interest advocacy:
  - legal status
  - funding for consumer bodies
  - role (policy and system issues)
  - retail pricing
  - intervention
  - need for expertise
  - education

5.1 Complaint and dispute gathering and resolution

5.1.1 In a paper prepared for Energywatch in 2004 entitled *A Future Approach to Energy Complaints and Dispute Resolution,* (Wood, 2004) John Wood of FEMAG observed:

> The emphasis, throughout the relatively brief history of consumer protection, has been on educating and empowering consumers to effectively act on their own behalf. In reality this means middle class, educated, and articulate consumers. The theory being that action taken by this group of consumers and their organisations will have a trickle down effect in improving markets - and the responsiveness of players in those markets – to the real needs of consumers, by which all consumers will benefit. This has been the model that has dominated in both the developed and developing economies. It has

been up to now pretty successful.

5.1.2 *In house consumer complaint systems* – Wood commented in the abovementioned paper that:

> The ideal scene, obviously, is for the provider to handle all complaints effectively. Thus they own the solution to the complaint, use the experience to improve their performance – and incidentally their efficiency – and they greatly improve the loyalty of their customers and boost their profitability (see research *ad infinitum* substantiating this).
>
> The scene is not ideal. Consequently it has been recognised that there needs to be an intermediary to jolly, cajole, or compel satisfactory complaint handling. These intermediaries can take several forms:
>
> - Consumer NGOs which help explain and advise on action to take, and occasionally initiate action;
> - 'Gatekeepers' that point the way to a complaint advocacy or resolution body;
> - EDR schemes which have the power to resolve complaints if approaches to the provider fail; and
> - Regulators who can take action on behalf of consumers for breaches of law.

The AAMI experience:

The best example of a consumer driven change in management approach by a company in Australia, is that of AAMI Insurance. AAMI developed a Customer Charter over a period of 14 months starting in 1995, following a process that involved staff, customers, and external stakeholders, which revolutionised the way the company approached its business. All commentators agreed that it was a remarkable demonstration of how, by focussing on identifying and meeting consumer needs, a company builds its business. As a result the company increased its policies written by 55% and premiums by 111% over the next 4 years

5.1.3 In Australia it is common for utilities to operate their own internal complaint systems. In some cases it is a condition of licences. In Victoria a retailer must submit for approval and implementation a dispute resolution scheme. In Western Australia a retailer must lodge with the regulator, a dispute handling process. It is also a common requirement for complainants to be required to have availed themselves of in house complaint systems before being able to be considered by external complaint systems.

Australian Standard on Complaints Handling

Since 1995 many Australian organizations have used the Australian Standard on Complaints Handling to guide and benchmark the operation of their complaints handling system. In some instances its use has been actively promoted by regulators (e.g. Australian Securities and Investment Commission (ASIC)) and external dispute resolution schemes. An international standard on Complaints Handling (ISO 10002) was published in July 2004 and a Standards Australia committee is about to vote on its adoption as the Australian Standard.

ISO 10002 states that implementation of the process described in the International Standard can:

- provide a complainant with access to an open and responsive complaints-handling process;
- enhance the ability of the organization to resolve complaints in a consistent, systematic and responsive;
- function to the satisfaction of the complainant and the organization;
- enhance the ability of an organization to identify trends and eliminate causes of complaints, and improve the organization's operations;
- help an organization create a customer-focused approach to resolving complaints, and encourage personnel to improve their skills in working with customers, and
- provide a basis for continual review and analysis of the complaints-handling process, the resolution of complaints, and process improvements made.

Organizations may wish to use the complaints-handling process in conjunction with customer satisfaction codes of conduct and external dispute resolution.

5.1.4 *External consumer complaint handling* – Wood noted in relation to the legal status of such schemes:

> International experience is demonstrating, I believe, that statutorily underpinned industry dispute resolution schemes are becoming the most important and effective means for resolving consumer complaints and in improving the performance of the industries involved in resolving their own complaints at first instance.

Wood added:

> These schemes are now operating in a large number of industry sectors, especially utilities and financial services. Typically they are managed by a Board made up of

equal numbers of consumer* and industry representatives, and Chaired by an independent person. That Board sets or amends the Terms of Reference for the operation of the scheme; ensures that it is properly financed; and appoints either an ombudsman (the usual method) or a dispute resolution panel (used in some insurance schemes). The ombudsman is then totally in charge of the operation of the scheme and the employment of staff, etc. Industry members are bound by the determinations of the ombudsman, but consumers are able to proceed to a court if they are dissatisfied with the outcome. This latter is a key element in balancing the otherwise inequitable balance of bargaining power between the parties.

*****To avoid the appointment of 'token' consumer reps, guidelines have also been developed relating to the appointment of consumer representatives.

5.1.5 The non-statutory ombudsman type system was generally seen to be operating effectively and was the favoured option by those we consulted. There is recognition that any complaint/dispute system will be somewhat harder to access for less advantaged consumers and thus have greater challenges as far as effecting improvements in the market for these groups.

5.1.6 In the case of the USA jurisdictions considered the regulators each have a role in complaint handling. In many cases this role is supplemented by Citizens' Utility Boards. In the case of Energywatch this is a key function of the office with the requirement of giving priority to certain groups of disadvantaged people enshrined in legislation. In the case of New Zealand and most Australian states and territories there are specific complaint or ombudsman bodies. It is a common requirement of licensing for retailers to participate in an ombudsman scheme. There are three main components of the New Zealand scheme:

- electricity and gas codes of practice – every member company agrees to maintain the standards in the codes for all their dealings with consumers;
- internal complaints process - all member companies must have an internal complaints system and complainants must have used that scheme before approaching the Commissioner; and
- Complaints Commissioner.

5.1.7. Again it is a common feature in Australia that utility companies must comply with the ombudsman's decisions.

5.1.8 In a number of US jurisdictions bodies can investigate matters of their own volition or take up complaints by an association of persons. An interesting feature of Energywatch is that it can refer special matters to the Regulator. In the case of Maine, when a certain number of complaints are received the Maine Public Utilities Commission must accord the complaint special treatment.

5.1.9 In some of the models considered in the US there is both a formal and informal complaints system. Under the informal system the regulator endeavours to resolve the complaint through counselling or mediation. The Illinois Commerce Commission operates a three way calling system (between the complainant, utility company and the Commission's consumer service division) – it believes this

approach increases the efficiency in resolution and results in a high degree of satisfaction. With the formal complaints system the regulator holds a formal hearing often before an administrative law judge with complainant and utility often being legally represented. In some states even if the parties reach a resolution the outcome has to be considered by the regulator to ensure it is in the public interest. The Arizona Corporation Commission has a very broad brief. If it finds that a service is unjust, unreasonable or in sufficient it shall determine what is just, proper or sufficient and shall enforce its decision by order or regulation.

5.1.10 The US citizens' utility boards often play a part in resolving complaints. They can also refer complaints to regulators and in many cases can intervene, particularly in the formal hearing process. In Oregon the Board may refer complaints to appropriate agencies and be informed of the outcome. It may intervene in proceedings and can seek administrative or judicial review of any agency action.

5.1.11 *Legal status* - In some cases the bodies responsible for handling complaints are divisions within the regulatory commissions – that is typically the case in the US jurisdictions considered. In the case of the UK's Energywatch, while it is a government body it is independent of the electricity and gas regulator. In contrast the situation in Australia and New Zealand, as mentioned above, is that the complaint handling bodies are normally separate and independent of the regulator with the industry being primary responsible for establishment of the body in NSW, Victoria and South Australia while the bodies in Queensland**,** Western Australia**,** Tasmania and ACT are government authorities**.**

5.1.12 *Funding for consumer complaints systems* – In the case of the non-government complaint handling bodies in Australia and New Zealand and in the case of Energywatch funding is provided by utility licence fees. ECPO is also funded by the industry. In the case of the citizens' utility boards in the US funding is generally provided by members. In Illinois the Board funding was initially provided via membership flyers inserted in utility bills but this practice was blocked by utility companies – the practice was held to be unconstitutional – and since 1986 the Board has been allowed to include membership inserts in mass mailings by state agencies with the insert contents being approved by the Illinois Commerce Commission. The Residential Utility Consumers Office (of Arizona) seems to be different in that funding is provided by a levy on utility companies following an assessment by the Arizona Corporation Commission.

5.1.13 It seems to us that with national benefits expected to flow from the national approach to regulation of gas and electricity there may be also benefits in a *national approach to complaint handling*. We tested this in the market place but only found limited support for the proposition.

5.2 Compliance and enforcement

5.2.1 *Compliance obligations* – US regulators generally have the power to issue governance rules and administrative rules. The Oregon Public Utilities Commission

continually monitors activities of regulated companies, scrutinises rate and service matters, develops and enforces regulations and may adopt and amend rules to govern administrative proceedings and administrative matters. In the US some regulators hold public hearings in relation to alleged breaches. For instance, the Ohio Public Utilities Commission operates a public hearing process with a Commissioner or attorney acting as judge. The Maine Office of the Public Advocate can request the regulator to institute proceedings in relation to an alleged breach and receives all document provided to the Public Utilities Commission. The Illinois Commerce Commission may hold enforcement hearings where it has reason to believe there has been a breach of a statute, a Commission rule, regulation or requirement. The process in the jurisdictions considered is much more adversarial than in Australia.

5.2.2 The compliance process in Australia is very different from the jurisdictions considered in the Unites States. Australian jurisdictions require utilities to maintain internal systems to effectively manage compliance with the licence (or the law).

Australian Standard on Compliance Programs

AS 3806 is designed to assist organizations to set in place and maintain an effective regulatory compliance program. As the standard itself states the purpose of the Standard is to provide a framework for an effective compliance program, the performance of which can be monitored and assessed.

A compliance program is an important element in the corporate governance and due diligence of an organization, and should:

- aim to prevent, and where necessary, identify and respond to, breaches of laws, regulations, codes or organizational standards occurring in the organization;
- promote a culture of compliance within the organization; and
- assist the organization in remaining or becoming a good corporate citizen.

5.2.3 Though there are differing procedures, regulators in Australia can have independent auditors undertake compliance systems and performance audits of energy companies. There is also a requirement in a number of states that requires retailers to report a material breach of any relevant laws, regulations, codes, service standards, etc to the regulator. In the ACT a retailer must notify the regulator of a breach as soon as practicable and provide a brief report of the circumstances of the breach, state the consequences of non compliance and set out the measures it has adopted to deal with the breach. ACTEWAGL, the major retailer in the ACT has no difficulty with this requirement. It takes the view that if there is a breach they will automatically put in place a process to minimise the risk of it occurring again. In the Northern Territory there is a requirement for a retailer to conduct an annual

independent audit of its operations and compliance.

5.2.4 *Information gathering powers* - In Australia broad information gathering powers are generally in the hands of regulators – broadly a retailer must provide any information requested by the regulator. Those powers are often also required in the resolution of complaints too.

5.2.4 *Sanctions* – The Essential Services Commission (Victoria) may impose sanctions including revocation of licence for a non-trivial breach of its licence conditions**.** Revocation, suspension or termination of a licence is available in jurisdictions throughout Australia as the ultimate penalty. IPART may impose penalties and the Minister may revoke a licence. The Queensland regulator has imposed fines and in one case suspended a licence.

5.2.6 OFGEM in the UK may impose financial penalties – it has imposed fines of some AU$10 million in the last few years. Energywatch seeks compensation. In New Zealand there is a Rulings Panel that can impose a range of sanctions including a warning letter, compensation, monetary penalty, suspension or termination.

5.2.7 The Arizona Corporation Commission can act in a judicial capacity and impose financial penalties. The Illinois Commerce Commission can also impose fines but in the case of Illinois the law sets out guidelines for the imposition of penalties – matters relevant include past compliance history, whether the contravention came about by mistake, inadvertence or negligence, whether it was wilful, whether it was harmful to the public, the extent of the violation, the amount of money that accrued as a consequence of the violation. The Ohio Public Utilities Commission can order relief for complainants and corrective action.

5.2.8 *Right of Appeal* - In Australia as in other jurisdictions considered there is generally a right of review or appeal in relation to the imposition of sanctions. In NSW a company may appeal to the Court in relation to a licence suspension or the Administrative Appeals Tribunal in relation to a monetary penalty.

5.2.9 *Private right of action* – This process is very much part of many jurisdictions considered in the US on the part of Boards. This reflects that fact that the priorities of the regulator do not always match those of consumer advocacy bodies. Private right of action is also available under the Australian TPA and is often used by business against competitors in relation to conduct that is misleading or deceptive.

5.2.10 *Right to intervene* – In the US it is common for Boards to intervene in proceedings before regulators. This is particularly the case when it comes to applications by retailers for rate increases. The Maine Office of the Public Advocate can intervene on behalf of the public or a group of consumers and has the right to request documents.

5.2.11 *Need for expert witnesses* – It is common for Boards in the US to engage experts to assist them. This is often the case in price hearings. With the increasing complexity of matters involving energy it is important for consumer advocacy groups to have available to them similar technical skills as the regulators and utility companies to ensure proper testing of matters. It makes the process more

transparent and makes the regulator more accountable.

5.2.12 *Transparency and reporting* – Most regulators provide annual reports of their activities and have web sites where they set out details of their activities. In the case of New Zealand the terms of settlement of every breach of their laws must be made public. In the ACT a retailer must report annually on its compliance and as mentioned above make a summary of that annual report available to the public.

5.3 Consumer and public interest advocacy

5.3.1 As earlier noted Energywatch asserts seven rights for consumers. They are:

Energywatch - Rights of consumers:

- access to warmth power and light;
- information – clear, accurate and up to date information, right to be protected against misleading marketing, information to enable them to use energy efficiently and safely;
- choice;
- representation – right to express their interests in the making of government policy and its implementation, right to expect companies will seek and consider their views;
- redress – to know what is happening and when things will be fixed, compensation, right to responsive regulation where markets fail to protect their interests;
- safety; and
- sustainability – to participate in shaping energy policy and to contribute to sustainable energy consumption.

5.3.2 In a paper prepared for the Consumer Federation of Australia by The Allen Consulting Group in June 2004 on National Energy Market Consumer Advocacy it was recommended that a consumer advocacy institution be established to:

> Represent the views of, reflect the impacts upon, and support the involvement of small users, including small business, in policy making in the national energy market as it affects consumers. This involvement should contribute to the establishment of the national energy market and to ongoing decision-making once the market is established.

5.3.3 It also recommended:

> That the primary focus of the new advocacy institution should be:
>
> - contributing to policy formation on national energy market issues on behalf of small consumers, in accordance with its own priorities, and at the request of regulators and governments; and

- lobbying or advocating on behalf of small energy consumers.

To be effective in these roles, the institution's supporting functions should be:

- research on national policy and operational issues of interest to small energy consumers;
- informing, educating and consulting small consumers and other consumer groups about broad national energy market policy issues; and
- providing funding for other advocates, both for:
- specific projects initiated by the new advocacy institution to support its priority work; and
- for projects nominated by others to ensure that there is a channel for national energy market issues of particular concern to consumers and other consumer groups to 'bubble up' to the new advocacy institution.

The structure of the institution should strike a balance between having a clear focus on national issues and having ways of making sure it is informed about consumer views, issues and impacts on the ground. There are several ways of achieving this with a national organisation – including establishment of a reference group, sub-boards or an employee presence in each jurisdiction – each may be appropriate at different stages of national energy market development.

5.3.4 In March 2005 the MCE, Standing Committee of Officials issued a paper on Consumer Advocacy. The MCE recognises that active participation by energy users and suppliers is important to the development of a more innovative and responsive energy market, achieving effective competition and maximising the benefits of market reform of the energy sector.

5.3.5 The MCE agreed that action needed to be taken to "assess existing consumer advocacy models and develop a workable institutional model to take account of the changing advocacy needs of an Australian energy market".

5.3.6 The National Consumers Electricity Advocacy Panel was established in 2003 as the key national advocacy institution for the Australian energy market. Its primary role is to determine applications for funding consumer advocacy. It will operate until 30 June 2006. Amongst other things, the Panel has funded organisations including Councils of Social Service to employ energy market project officers. (The Allens Report referred to above concluded that 'neither the Panel nor existing advocacy organisations, in their current forms and with their current resources, have the capacity to fulfil the recommended objective for a national energy consumer advocacy institution or to succeed in the new advocacy task.')

5.3.7 Following a tender process by MCE KPMG was selected to undertake a review of current consumer advocacy arrangements. The KPMG paper, entitled *Review of Consumer Advocacy Requirements*, was released in March 2005. KPMG noted that there are currently a number of organisations to address consumer advocacy requirements in the energy sector at both the national and state and territory level. However, it concluded on the basis of stakeholder consultations that they have

limited capacity to effectively undertake work in the current energy market environment. It also concluded that there is a need for consideration to be given to the creation of additional arrangements in order to provide effective end user advocacy, as the national energy market continues to evolve. KPMG has proposed four possible options for future consumer advocacy arrangements. These are set out in more detail in the MCE paper. They are:

Option 1 – a national energy committee building on State and Territory based consumer advocacy bodies;

Option 2 – a committee model based on the existing NECA Panel;

Option 3 – a separate institution incorporating a consultative committee to support a Chair and 6 member Board;

Option 4 – a separate institution incorporating a consultative committee to support the Executive Director, Chair and two person Board.

5.3.8 A submission on Consumer Advocacy Arrangements was made by a group of consumer and community organisations to the MCE SCO on 6 May 2005. This submission argued for a non-statutory independent body established as company limited by guarantee. With some qualifications the option of an independent body was favoured by most of those we consulted amongst consumer and community organisations.

5.3.9 The Citizens' Utility Boards and similar bodies in the US are involved in consumer complaint issues but they also take a broad consumer advocacy role particularly in testing applications by utilities for price increases. For instance, the Citizen's Utility Board of Oregon considers it advocates forcefully and vigorously on behalf of consumers on all matters of public policy. The Illinois Board appeals unfair regulatory decisions in Court and promotes tougher consumer protection laws.

5.3.10 Energywatch also takes a broader perspective. It makes proposals, provides advice and information about consumer matters to Ministers, regulatory authorities and it can also act as an advocate for consumers. It works with companies encouraging changes in their policies, processes and systems that make them more responsive to consumers.

5.3.11 Priorities of Energywatch are heavily influenced by complaints and enquiries it receives. For instance, a recent analysis showed that consumers faced billing problems, unsatisfactory selling practices and switching. This led to major campaigns to address these issues. It also conducts surveys on consumer attitudes. At the beginning of each year it circulates for public comment a proposed work program.

5.3.12 *Consumer advisory councils* – There is a requirement to establish these in many Australian jurisdictions. In Queensland there are seven regional councils that meet four times a year. They provide advice to electricity retailers and regulators. In New South Wales a retailer must prepare a constitution and procedures of a customer consultation group with the charter being approved by the Minister.

5.3.13 *Mandatory codes of conduct/practice* – This is an important element of protecting consumers and features strongly in Australian jurisdictions. Ensuring compliance is an important component of compliance reports and audits.

5.3.14 *Systemic issues* – Addressing these is an important aspect of the work of Energywatch. It is also an issue that regulators and ombudsmen throughout Australia recognise as important and which they seek to address in a variety of ways such as attending consumer council meetings, liaising with community groups, monitoring complaints, monitoring media reports

5.3.15 *Retail pricing* – Even though regulators in the US and Australia need to approve price increases by utility companies the process of consideration of an application for pricing increases in the US is very different to the process in Australia. Again it is more of an adversarial approach in the US.

5.3.16 While the processes are both generally transparent the process in the US is more public in the sense that regulators often hold a public hearing in respect of application with Citizen's Utility Boards taking part in the hearing process. Australian regulators encourage consumer groups to be involved but they recognise their input is limited by resources and the need for technical expertise.

5.3.17 Provision of *comparative information* on prices is a key function of Energywatch and Powerswitch in New Zealand.

5.3.18 *Intervention* - The Arizona Corporation Commission is ultimately responsible for approving or denying price increases but its process allows for intervention by interested parties who are able to present evidence, and are given the right to cross examine other parties witnesses and the right to make written submission. Interveners also have the right to obtain additional information from the utility company. The process is a public hearing process that is held before an administrative law judge. The Commission also sometimes holds public information sessions to allow for input from consumers in general.

5.3.19 *Need for expertise* – There is provision for public input into pricing enquiries in Australia and many regulators encourage consumer participation. However, as discussed above there is often a need for advocacy bodies to have the technical skills to test what is being put and for such groups to have access to appropriate information.

5.3.20 *Provision of information to consumers* – This is a key function of Energywatch. As mentioned earlier it engages in information campaigns and also it provides comparative information on costs of energy to consumers. This is also the function of Powerswitch in New Zealand. Many of the regulators in the US also provide information to consumers including their rights and responsibilities. This function is also provided by the consumer bodies. The Consumer Service Division of the Illinois Commerce Commission provides educational material to consumers by way of booklets, web site material, public appearances, panels and workshops.

5.3.21 The need to provide information to consumers is well recognised in Australia. Regulators and ombudsman offices provide information to consumers in the form of

brochures, booklets and website information. ECPO has regional offices throughout Queensland where an important function of staff is to liaise with community groups and other stakeholders.

5.3.22 The Essential Services Commission of Victoria (ESC Victoria) and the Essential Services Commission of SA have programmes on their websites, similar to NZ's Powerswitch programme, to assist consumers' information search.

6. SUGGESTED ELEMENTS FOR EFFECTIVE PROTECTION OF CONSUMERS AND PROMOTION OF CONSUMER WELFARE

6.0.1 As we stated in the Preamble, when a market is to be employed to deliver goods or services to the community we believe a number of interdependent elements must be involved for delivery to be equitable and efficient:

- research;
- advocacy;
- policy and rules; and
- compliance action and consumer support

6.1 Research

6.1.1 We have examined some research results, but a comprehensive survey and assessment of the available research and research capacity in the jurisdictions under consideration was outside the scope of this project. Our following observations are made with this caveat.

6.1.2 We are aware that not an inconsiderable amount of research has been undertaken by people in a range of organisations. However, several of those stakeholder representatives we spoke to were strongly of the view that a significantly increased research capacity was needed to fully inform policy and rule making and regulatory actions.

Some consumer scenarios

It is a cloudy midwinter afternoon. Soon it will be dark.

At number 17 Brown St, 40something David, has got the kids doing their homework and will shortly start making dinner so it's ready when his lawyer wife gets home. It is his day of the week off and he is finishing a spread sheet that compares the contracts on offer from the three electricity retailers serving the area and allows him to determine which will suit the family best based on their last three years' consumption figures.

At number 17 Jones St Penny and Stephen aren't home. They won't be for some time. As for most working days they will get something to eat in town. Tonight they are meeting some friends to plan next February's OS ski trip. In the paper recycling bin there is a brochure from the new electricity retailer. Their prices looked good, but it didn't seem to be worth losing a couple of hours of rare leisure time comparing them with those of the current contract and the others on offer to save maybe a couple of hundred per annum.

At number 17 Smith St it is quiet. The radio and the TV are silent. There is even no hum from the fridge. It is cold in the house. 11-year-old Peter is desperately trying to get his homework done before the light fails. He is wondering how long it will be before the electricity is again connected. His father, who has been out of work for months, is digging the compost into the veggie patch. . He is hoping to be able to get something

growing when the weather starts to warm up a bit and wondering where he can get help to get the power put back on. Mum should be back from her casual cleaning job soon and with a bit of luck she'll be able to get a hot chook on the way home.

In a small industrial workshop in another part of town Tony has almost finished a big job. It has taken a long time but despite all types of problems it will now be completed on time and he knows that if they are satisfied with his work he will get many more contracts from them and it will make his business. Suddenly there is a blackout. He contacts his electricity supplier and finds that power will be off for an extended period. They are sorry for the oversight in not telling him that power to his area was to be cut. He won't complete the job on time.

6.1.3 The above are but a few possible stories of experiences with the energy market. How are these and the numerous variations addressed? We need to know how common these scenarios are, what perceptions there are in the market place, what the market place wants. We believe that the available research does not tell us enough about consumers' attitudes and experience with purchasing energy in Australia. There is anecdotal information, but quantitative information is limited.

6.1.4 From research such as that undertaken by Rich and Mauseth (2004) we know that the "Smith St" type experience is all too real for some people. We know that in some jurisdictions there are regulatory instruments and other programmes designed to prevent this experience and programmes to assist people who get into these circumstances. We also know that a number of companies make substantial efforts beyond regulatory obligations to prevent this experience. We know that there are not very large numbers, but arguably one such experience is one too many. Our consultations suggested that too many people in these circumstances are unaware of their rights and of available assistance under the relevant regulatory instruments and programmes. We understand that it is often the case that people in these circumstances only take action when assisted by a community worker (e.g. financial counsellor), but we also understand that there is not a general enough awareness of regulations and programmes amongst community workers.

6.1.5 We think there may be rather few "Brown St" type consumers; that is those undertaking the information search needed to make sound decisions. For markets, which have uniform products across all consumers and which have relatively uniform consumption behaviour, to operate efficiently substantially less that 100% of consumers undertaking thorough information searches may be needed. In energy markets however, a fully informed rational decision involves a consumer matching one of a range of products with their household's particular consumption behaviour. Those who have the ability to use a spreadsheet and to do projections probably do

not have the time to do them. Those who have the time probably generally lack the capacity. It seems that tariff structures are generally not presented to make side-by-side comparisons easy and we have not seen any enthusiasm amongst suppliers for rules to standardise formats.

6.1.6 We are aware of some overseas research relevant to this (e.g. by Energywatch, 2004 and Wilson and Waddams-Price, 2005) and of the *Special Investigation: Review of Effectiveness of Retail Competition and Consumer Safety Net in Gas and Electricity* (Jun. 2004) of the ESC Victoria. We suggest more is needed to tell us just how well energy markets are working for consumers. We understand the Consumer Law Centre of Victoria is involved in some further research in this area.

6.1.7 We recognise that most of the policy and rule making and regulatory agencies have some research capacity and/or the resources to have research undertaken as does industry. Consumer and public interest organisations have a much more limited capacity. The National Consumers' Electricity Advocacy Panel fund is a source for this. We think its $1m per annum is not as much as is needed especially as it is to support both research and advocacy. There are also some constraints on the projects for which the funds may be used.

6.1.8 We note that the Allens and KPMG reports recognise the need for consumer advocacy to be supported by research and suggest some research capacity be built in to any consumer advocacy body. The joint submission by consumer groups on consumer advocacy arrangements argues for this.

6.1.9 We think it could be effective and efficient for a dedicated research entity, perhaps a university based centre, to serve the research needs of all stakeholders and the community at large. This would not obviate the need for some in-house capacity in policy, rulemaking, and regulatory agencies, in companies and industry bodies and any consumer advocacy body to undertake some research and interpret research. It would mean, however, a lower level of research resources within each. Such a centre would need to be guided by an advisory body constituted to represent the various stakeholder interests.

6.2 Advocacy

6.2.1 There are broadly three interests that need to be advocated in the policy and regulatory process – those of producers, those of consumers and those of the public at large. Producers in the various parts of the energy market are well organised and there was no suggestion in the consultations and research we undertook that they were other than fully capable of presenting information on the supply side of the market to policy and rule makers, regulators, researchers and consumers and the public at large. Similarly in relation to larger consumers of energy there is no indication that they are disadvantaged.

6.2.2 We believe there is a fundamental need for advocacy:

- to promote consumer and public welfare interests in the development and

review of regulatory instruments

- to scrutinise licensing processes, and
- to thoroughly test issues that may come before regulators, particularly in relation to pricing and standard of utility services.

Strong advocacy of the interests of the most vulnerable consumers, those living in disadvantage, is critical.

6.2.3 In our view the most significant inadequacy in arrangements relating to energy supply in Australia is in consumer advocacy and public interest advocacy. We compare very unfavourably with the USA and the UK. In both countries there are bodies that are very effective in ensuring that consumer interests are well articulated in policy and rule making and in regulatory processes.

6.2.4 In the UK the government established Energywatch in 2000 some time after energy supply was opened to the market. It has a substantial budget generated from license fees. We are firmly of the view that the most effective consumer advocacy is achieved when over time a team with a high level of experience and expertise in the operation of energy markets can be developed. Energywatch has been able to play a significant role in improvements in the regulatory arrangements and in the level of regulatory compliance in the UK. A particular illustration is the fact that disconnections have declined in the past few years sevenfold – from around 25,000 to around 3,000.

6.2.5 Energywatch is no shrinking violet when it considers criticism of companies or the regulator or indeed the government is required. However, the way it generally operates is in a collaborative, problem-solving manner with other stakeholders, which is rather different from the way consumer advocacy organisations operate in the USA. In part this is because some of the regulatory procedures in the USA have adversarial processes built into them and perhaps in part because of a more adversarial tradition in general in USA public administration. Consumer advocacy in Australia has been characterised by a collaborative, problem-solving approach (see Brown and Panetta, 2000) and in our experience this more often achieves the best outcomes.

6.2.6 We do not argue that the Energywatch model for advocacy (minus the complaints function) should simply be replicated in Australia. However, we believe it is necessary to have a small national team of people with a similar level of expertise with people in states and territories able to ensure this team is kept in touch with consumer experiences and compliance issues on the ground. We do not readily see how the MCE's last decision on consumer advocacy (Communiqué 4 November 2005) will provide for this.

6.3 Policy and rules

Guiding Principles

6.3.1 As discussed earlier the UK's Energywatch asserts seven basic rights for

energy consumers* as follows:

1. access to warmth, power and light;
2. information – clear, accurate and up to date information, right to be protected against misleading marketing, information to enable them to use energy efficiently and safely;
3. choice;
4. representation – right to express their interests in the making of government policy and its implementation, right to expect companies will seek and consider their views;
5. redress – to know what is happening and when things will be fixed, compensation, right to responsive regulation where markets fail to protect their interests;
6. safety; and
7. sustainability – to participate in shaping energy policy and to contribute to sustainable energy consumption.

(* Of particular relevance to Energywatch's asserted right number seven we note that the Gilbert and Tobin / NERA paper recognises "that Ramsey pricing involving mark-ups over incremental cost that are inversely proportional to each customer's or class of customers' elasticity of demand does enhance economic efficiency." The paper then says "However, such a principle is very difficult to codify or evaluate in a regulatory context." We think that this is rather too readily dismissive of the Ramsey pricing possibilities. We agree that regulatory codification and evaluation would be difficult and in the end there would be a lack of precision in terms of matching regulated prices with consumers' demand elasticities. We suggest though that the detriment of any lack of precision might well be outweighed by the overall efficiency gains and contribute significantly to sustainability. We note that this kind of approach has already been employed with stepped tariffs for water in some jurisdictions.

Of relevance to asserted right number one we note that in South Africa (perhaps in other countries also) government consideration has been given to a proposal that a regulated initial quantum of energy be supplied without charge to all households to cover some level of basic need. This might be described as Ramsey pricing with an equity modification.

These matters are beyond the scope of this paper. FEMAG plans to research and publish separately a paper on Ramsey pricing and options to meet basic consumer energy needs including limited free-of-charge supply.)

6.3.2 It is our view that policy on energy supply and regulation of markets in Australia should be based on principles along these lines. A number of these asserted rights inform our thinking in subsequent parts of this chapter.

6.3.3 Australian governments have, to varying degrees, determined that markets or quasi-markets should be employed in the delivery of reticulated energy. We think

there can be benefits from energy supply through a market. However, we would not suggest that arguments that some elements of supply might be more effective and efficient if non-market supplied should never be entertained. We are strongly of the view that because of their special characteristics (noted below) markets for energy are more prone to failure than others and therefore need greater regulatory intervention.

6.3.4 On this basis there are a number of areas of public policy that need to be co-ordinated with policy on energy supply particularly policy for poverty alleviation, sustainability policy and industry development policy. Under current arrangements there is opportunity for such co-ordination at state/territory level. Ideally any new arrangement which results in a policy and rule making and regulation shift to the national level should not make such co-ordination more difficult. We think satisfactorily achieving this would be far from straight forward and more attention to this is needed.

6.3.5 While the policy of energy reticulation through a market is in process of implementation at various stages around the country, what has not been settled is the full extent of the employment of markets and what market specific regulation needs to be added to the basic market regulation.

Reliance on general laws

6.3.6 It is our view that there are quite significant special characteristics of both energy supply and consumption that warrant substantial specific market regulation and this is reflected in the various consumer protection codes currently operating in Australian jurisdictions. These special characteristics include:

- some level of consumption by households is essential for health and well-being;
- because of measurement difficulty and arrears payment consumer control over consumption/expenditure is much more difficult than for many other products;
- there are monopoly conditions in some parts of the supply chain; and
- there are significant externalities.

Mandatory codes of conduct/practice

6.3.7 We consider these an essential component in systems for achieving high standards of performance of utility companies and for the effective operation of complaint handling systems. Most jurisdictions have such codes. These codes reinforce *Fair Trading Acts* and the *Trade Practices Act* in relation to misleading or deceptive and unconscionable conduct. Codes to regulate marketing conduct as follows are required:

- training for marketing representatives;

- use of plain language contracts;
- provision of information to consumers;
- making comparisons with other retailers;
- identification of agents;
- harassment;

And codes, as follows, are required to regulate conduct when things go wrong:

- internal dispute resolution processes;
- disconnections;
- hardship programmes; and

A code on auditing can significantly assist compliance.

6.3.8 John Vickers Chairman, UK Office of Fair Trading in a paper "Economics for Consumer Policy" (Vickers, 2003) makes the argument well that competition cannot deliver its promises unless consumers have access to the right information for sound choices. This information must be accessible at a low enough cost, including time cost if consumers are to have any real prospect of being able to make the market work for them. We are strongly of the view that this will not be the case without the codes covering marketing conduct. We understand that ESC Victoria has contemplated a code to regulate tariff presentation so that comparisons can be more readily made. This would help significantly.

6.3.9 Website estimators provided for example by ESC Victoria and ESCoSA are useful tools for many consumers, but we think that the arrangements in the UK that allow for consumers to be provided with services that actually do the complete information search and analysis task for them should be considered for Australia. This would mean regulating to allow for multi retailer agents. We understand that UK's Consumers' Association (Which) provides such a service as a non-profit organisation is planning to rebate some of the commission paid by the energy companies to the consumer.

6.3.10 It is argued by some that codes have a limiting effect on innovation. In our experience and in the experience of a number of those we consulted any disadvantage is offset by the general benefits that codes deliver. We think that codes do in fact assist companies in risk management. In the absence of codes companies have to make their own judgements on what a court would see as complying with the *Trade Practices Act* for example. If a code is undesirably limiting innovation getting it altered is not necessarily a costly process.

6.3.11 For a code development and review process to be sound and to assist in ensuring that systems are effective to achieve code compliance it is of course necessary to have strong and sustained consumer advocacy.

To license or not

6.3.12 Theoretically it may be possible to cover all of the special regulatory

requirements of energy markets by adding energy market specific provisions to the *Trade Practices Act* and *Fair Trading Acts* and by mandating energy market codes under those acts or by making rules under the National Electricity Law or National Gas Law and that licensing need only be used to regulate for technical and environmental standards as proposed in the Gilbert and Tobin / NERA paper. We think that the license process, however, significantly assists achievement of regulatory compliance for the following reasons.

- *First*, the initial licence granting allows a process of assessment of companies prior to market entry. The Gilbert and Tobin / NERA paper suggests this is a barrier to entry. We found no convincing evidence that license systems have been or are barriers to entry nor that other approaches would deliver good compliance outcomes, including for codes for consumer protection, any more efficiently. Our consultations with regulators suggested very strongly that that companies actually find the licensing process valuable. It is seen as more efficient to go through such a process and to get the business plan right, especially including internal compliance systems, than it is to find a mismatch between regulation and the business plan after entry and to go through a retrofitting exercise. The value of codes and guidelines to companies is that that they obviate much work on internal compliance systems
- *Second*, a license is an asset. When this asset is under any kind of threat the bank financing the licensee is interested. The extra compliance pressure this provides may well be quite valuable. This would be of general importance if all companies were privately owned.
- *Third*, a license system can be much more responsive to changing market conditions resulting from economic, social and technological changes. Altering a license condition such as by way of revising a code with which the license requires compliance is much more readily done than getting changes to legislation. One of the reasons the Gilbert and Tobin / NERA paper argues that legislative instruments are preferable to administrative instruments is the legislative process results in greater precision because of a more rigorous drafting process. We are not sure of the basis of this assertion. Our experience is that consultations on draft administrative instruments are usually comprehensive. In fact the consultation processes used also usually allows scrutiny by interested members of the public. Indeed codes are often developed by stakeholder committees. We also note that legislative instruments run the risk of last minute (sometimes late night) unexpected amendments. Even if a legislation instrument has precision when enacted, we reiterate that conditions can change faster than it can be amended.
- *Fourth*, non-statutory ombudsman schemes are given life by license conditions. This was overlooked the Gilbert and Tobin / NERA paper.
- *Fifth*, having licenses that provide for consumer protection gives the licensing agency a role in achieving consumer protection regulatory compliance. This

means that three agencies, the licensing agency, the complaint / dispute ombudsman and the fair trading agency (either state / territory or ACCC), with somewhat different roles can work collaboratively to achieve the highest compliance levels. We have been advised of the effectiveness of such a tripartite approach in a number of jurisdictions. It is conceded by regulators that three agencies with an interest in consumer protection are effective in keeping them all at best practice.

6.3.13 The Gilbert and Tobin / NERA paper opines that as a matter of principle "licensing regimes should not be used as a device to impose legal obligations", but no authority is cited and no examples are given of problems that have arisen because of this use of licensing. Our view is that the test should be what works and experience in Australia and overseas, as far as we have been able to judge, is that this use of licensing does work. We suggest that it would be unwise to let go of it this kind of system without clear evidence of its shortcomings.

6.3.14 We agree with the Gilbert and Tobin / NERA paper that a regulatory regime should be as transparent and as simple as possible. We do not agree that a licensing system is necessarily prone to opacity nor to rule proliferation and complexity. We do strongly suggest that any national licensing system should be quite open to scrutiny of stakeholder groups and the community at large. Moreover we think that there are good reasons to provide for appropriate processes of intervention.

6.3.10 We say that for a national licensing system to operate effectively, and indeed to ensure avoidance of the kinds of problems the Gilbert and Tobin / NERA paper suggests it will be critical to have a well resourced consumer advocacy player with a high level of expertise and experience in the social economic and legal aspects of energy market regulation.

Regulatory roles

6.3.15 In our view current state / territory arrangements under which the energy market is one of a number of markets for which a regulatory agency is responsible are beneficial. In our experience single market regulators are much more at risk of some level of regulatory capture. We have observed in various regulatory regimes that officials in single market regulatory agencies, even with the best intentions, can become too close to the industry they are regulating. We think it most important that the AER, especially if it is to acquire significant state / territory regulatory functions, maintains a close engagement with the ACCC. We are also strongly of the view that no provision of parts IV and V of the TPA which the AER might be charged to administer be excluded from ACCC enforcement. A memorandum of understanding can provide for day-to-day management of any dual jurisdictional difficulties.

6.3.16 It is also our experience that fusion of competition and economic regulation with consumer protection regulation in one agency is highly beneficial. Community organisations, media commentators and the community at large can understand consumer protection regulation much more readily than competition and economic

regulation. The general community support and confidence that a regulatory agency needs to be effective is more easily developed if at least part of its role is generally well understood. The effectiveness of the ACCC, which has all three roles, is envied in other parts of the world. The fact that that ACCC is almost invariably labelled the "consumer watchdog" in the media whether the story is about a part V or part IV or economic regulatory action illustrates our argument.

A public interest statement

6.3.17 We consider that regulators need to have a specific brief to protect the public interest. Perhaps there should be a provision in legislation that requires regulators to have regard to such things as the social impacts of their decisions, their consequences in terms of standards of quality, reliability and safety of services and the protection of consumers from abuses of monopoly power in relation to both prices and standards of service

Access to remedies

6.3.18 An important element of effective and non-discriminatory enforcement is for all business and consumers to be given, on a non-discriminatory basis, access to judicial and administrative remedies. The various complaint handling processes are an important part of this but there is a also a need for private right of action if consumers or groups of consumers are aggrieved by the conduct of energy suppliers and are not satisfied with the conduct of regulators. Interestingly Energywatch does not have any enforcement powers but instead relies on persuasion. Private right of action is also discussed further below.

Sanctions

6.3.19 These must be credible to encourage compliance and they must be sufficient and must be imposed in a timely manner. There must be the ability to impose or seek meaningful fines (that is large enough to have an impact on the business). We note that the legislation in the case of the Illinois Commerce Commission sets out guidelines for the imposition of fines. We believe this is appropriate.

6.3.19 Adequacy of sanctions is an important element of enforcement and compliance. Ideally there should be a range of penalties available consistent with the breach.

6.3.20 The Rulings Panel of New Zealand can impose a range of sanctions including a warning letter, order for more stringent record keeping, compensation, monetary penalty, suspension or termination. There should also be an ability to impose other appropriate sanctions such as corrective advertising or the institution of a compliance program. The Ohio Public Utilities Commission can order relief for complainants and corrective action.

6.3.21 The Rulings Panel has guidelines on which to assess penalties such as whether

the breach was inadvertent, negligent, and deliberate or whether there were previous contraventions. The Illinois Commerce Commission takes into account past compliance history, whether the contravention came about by mistake, inadvertence or negligence, whether it was wilful, whether it was harmful to the public, the extent of the violation, the amount of money that accrued as a consequence of the violation. We believe criteria such as these are appropriate.

Private right of action

6.3.22 As mentioned this is a feature of many of the US jurisdictions considered. It is also available under some legislation in Australia (e.g. the *Trade Practices Act*). This reflects the fact that a regulator's priorities are not always consistent with those of others. We can see no reason why energy users should not have the option to take action under energy laws if they consider a breach is not adequately addressed by regulators. We see no reason why suppliers should not also be subject to this discipline.

Right to intervene

6.3.23 This is a common feature of US jurisdictions considered. For instance, the Maine Office of the Public Advocate can intervene on behalf of the Public or a group of consumers and has the right to request documents. We believe this is important for transparency and fairness in any regulatory process including the energy industry. We believe stakeholders should have the opportunity for meaningful participation. This would be facilitated if processes for consideration of matters were transparent. For instance, by adopting a public register type process as used by the ACCC in adjudication matters. We note that many energy regulators already use a similar process.

Need for access to expertise

6.3.24 This is very much tied in with the right to intervene. Consideration of energy matters often involves a high level of expertise. Some Australian regulators encourage consumer groups to be involved but recognise that input is limited by resources and the need for technical expertise. In order to make a meaningful contribution stakeholders need continuing and timely access to expertise and not just on an ad hoc basis. This aids in making processes more transparent and makes the regulator more accountable.

Information gathering powers

6.3.25 For a regulator to be effective it needs adequate search and investigation powers to allow it to collect information and documents and examine persons with relevant knowledge and where necessary to enter premises. Regulators in Australia

generally seem to have adequate powers here.

6.4 Compliance action and consumer support

6.4.1 In our experience the compliance / regulatory pyramid approach we discussed in the Preamble is highly effective in protecting consumers and advancing their interests.

6.4.2 Compliance with energy laws will be obtained through:

- effective in-house compliance systems – discussed above;
- timely, efficient and appropriate enforcement action;
- advocacy – discussed above;
- information dissemination; and
- increasing market transparency.

6.4.3 There is an Australian Standard (AS3806) on compliance. This standard sets out essential elements for establishing, implementing and managing an effective compliance program within an organization. The standard is not mandatory though regulators such as ASIC and the ACCC have actively supported the use of this standard as a means of promoting best practice in compliance managements systems. A checklist of structural and operational elements for compliance with AS3806 is set out in Attachment B.

Enforcement

6.4.4 Timely and efficient enforcement is probably the key element to ensuring compliance. However, it is vital to keep in mind that enforcement is not an end in itself but rather a means of achieving the primary objective of compliance with the law. It is a common practice in many jurisdictions for regulators to be able to take up issues and complaints of their own volition. We consider this to be an integral part of enforcement.

6.4.5 The purpose of enforcement action should be to:

- stop the conduct quickly;
- compensate any person who has suffered loss or damage as a result of the contravention of the law – this is partly addressed by dispute resolution – see below;
- undo the effects of the contravention;
- prevent a future contravention of the law, particularly in the longer term;
- provide deterrence to the industry; and
- incapacitation.

Compliance auditing/reporting

6.4.6 This is the main way that regulators in Australia go about ensuring compliance with licences, legislation, codes, etc. There is a requirement for regular reporting, particularly in terms of compliance with obligations relating to small customers. In some cases there is three monthly, six monthly and annual reporting requirements while in most cases there are at least annual reporting requirements. There is also commonly a requirement for utility companies to provide immediate advice to the regulator of any material breach.

6.4.7 Reporting requirements are supplemented in some jurisdictions by independent audits of companies with the reports being provided to the regulator. In the case of IPART the scope and timing of these will depend on the results of previous compliance audits and each supplier's licence compliance history. New licences may be audited in the first six months of operation to confirm necessary systems have been established to ensure licence compliance.

6.4.8 Regulators are conscious of differing reporting requirements between different jurisdictions and have been working for some time to standardise reporting requirements. This would seem desirable provided jurisdictions have the option to require more detailed / additional information to suit the circumstances of their jurisdictions. It would seem to us that this is an area that may well benefit from input from community and consumer groups. Also in relation to areas targeted for audits there is again likely to be benefit to the community if community and consumer groups had the opportunity for input.

6.4.9 The approaches used by Australian jurisdictions to achieve compliance seem to be more structured and comprehensive than what appears to be undertaken in US jurisdictions considered and we therefore favour the Australian approach, particularly the approaches in New South Wales, Victoria and South Australia.

The balance between reporting and auditing

6.4.10 There are differences amongst jurisdictions in Australia in terms of the balance between reporting and auditing and different views amongst those we consulted on where the balance should lie. There seems to be general agreement that immediate (that is within, say, three days) reporting of material breaches of license obligations is a very effective compliance tool. Some say that periodic (three, six monthly / annually) reporting against all license obligations is a critical process for achieving compliance. Others say that there is a risk of periodic reporting becoming a mechanistic process with a lessening compliance effect. They say a sound programme of systems and performance auditing can be at least as effective as periodic reporting and more resource efficient in terms of both company resources and regulatory resources. They also say that the potential big stick of a poor audit report is more effective than the consequences of an unsatisfactory periodic report. The inevitability of an impending audit also has the capacity to keep an organization "on its toes." One of the weaknesses of self-reporting is its capacity to become self-

serving and lacking in objectivity.

6.4.11 We are impressed by the latter view, but are not in a position to come to a firm view on the most effective balance. We do not think that a simple comparison of measures such as complaints and disconnections between jurisdictions that have different reporting/audit approaches would be very useful. We think that a more sophisticated research project could assist.

6.4.12 There are different ways in which auditing is arranged. We think that it is preferable for auditors to be appointed directly by regulators.

6.4.13 We think it is appropriate for companies to bear the cost of auditing. The level of auditing that might be required for particular companies is likely to vary depending on the assessments of systems and performance. Audit payment mechanisms should reflect this.

Self reporting

6.4.14 This is a strong element of the Australian process. Factors that may support the development of a self-reporting culture include:

- clear documentation on the value of such reporting;
- management actively seen to be implementing and supporting the values;
- putting the focus on identifying and rectifying problems rather than blaming;
- making the link between reporting and maintaining quality standards; and
- promoting the primacy of protecting the public and broad interests over protecting narrow sectional interest within an organization.

Enforcement priorities

6.4.15 Energywatch regularly publishes its priorities. In doing so it is heavily influenced by enquiries and complaints it receives. The practice of setting priorities has also been adopted by the ACCC. In determining its priorities the ACCC looks firstly as to how that action would fit within its overall goals and objectives and would then consider the following:

- Is the conduct in question a blatant disregard of the law?
- Does it constitute a significant public detriment?
- Will any enforcement action have an educative or deterrent effect?
- Will it test new areas of the law or the scope of the act?
- Will it consider new issues?

6.4.16 Only a very small proportion of potential contraventions of the law are prosecuted by the ACCC. Most are resolved much earlier than that. Some may be disposed of by writing to parties involved to inform them of the requirements of the law. Some matters may involve development of an industry standard or the

development of an information brochure or guideline where the conduct is widespread and it would be unfair to single out a single party. Some may be settled administratively by the parties giving appropriate undertakings to the ACCC. Even where prosecutions are launched many are settled before the Courts hear them. Settlements may involve compensation to the parties adversely affected or other remedies such as corrective advertising or the requirement to provide further information to consumers. A diagrammatic illustration of this is provided at Para 2.2 above

6.4.17 The abovementioned approach allows for the informal or administrative settlement of the majority of matters that come before a regulator. The ability of the regulator to accept written undertakings is an important part of this process. In this regard we note that in the ACT a retailer must notify the regulator of a breach as soon as practicable, as is the case in a number of jurisdictions, but in the case of the ACT the retailer must provide a brief report of the circumstances of the breach, state the consequences of non compliance and set out the measures it has adopted to deal with the breach. We support this approach.

6.4.18 We also consider that such a report should be made available on the regulator's web site in a timely manner. The regulator may also be a need to seek comment of stakeholders, particularly any national advocacy body. In general terms we believe regulators should provide timely and comprehensive details of enforcement activities. We expect there would often be resistance to this practice but we take it to be in the public interest for consumers to have access to this information.

Sources of Information for regulators

6.4.19 This is an important issue for regulators. Market intelligence is a key element of effective enforcement. Sources include: research – in house or independent; complaints – direct, to EDR body, to fair trading agencies, to MPs; consultations with various stakeholder representatives; advisory committees; company self reporting (immediate reporting of license breaches or possible breaches; periodic reporting against regulator's requirements); audits; market research – e.g. mystery shopping; compliance visits; special inquiries; investigations; whistleblowers.

Information Dissemination

6.4.20 This may involve development of publications, brochures, articles in newspapers, providing training, providing of advice, seeking publicity for important issues, etc to educate the community and inform it of its rights. This would supplement the information already provided in Australia by complaint handling agencies and regulators.

6.4.21 As with Energywatch a key function of a national advocacy body could be the

provision of *education / information to the community*. This could include comparative costs of energy as provided by Energywatch and New Zealand's Powerswitch.

6.4.22 The establishment of consultancy bodies would be an important part of this process.

6.4.23 Provision of guidance to the energy industry itself is important. A culture of compliance needs to be instilled at all levels.

Increasing market transparency

Timely reporting

6.4.24 We note that regulators currently put information on compliance reports on their websites and issue publications. Provision of such information is becoming timelier. We support this and note that energy suppliers are often required to report material breaches to regulators as soon as possible. We believe it is also important that such matters be provided to the public in a timely manner and with the opportunity for input.

6.4.25 In general terms transparency will be assisted if companies view reporting as a valuable contribution to the company's efficiency and long-term success. Encouraging a strong reporting culture can be characterised as contributing to improving customer focus and the effectiveness of an organization. However, for a reporting system to work effectively there is a need for strong, sustained leadership supporting a culture of open disclosure, transparency and effective response to performance problems when they arise.

6.4.26 Regulators have a part to play here to in terms of timely and comprehensive reporting of information that the community should be aware of and in their being proactive in encouraging companies to provide information to the community.

Consumer support (complaint/dispute gathering, mediation, conciliation and arbitration)

6.4.27 It is our view that a key element of a good compliance culture in companies is a positive approach to complaints. This means they should make it as easy as possible for consumers to raise concerns. We think high profile agencies, as we have in the industry ombudsman schemes are important in developing the right culture in companies and in giving consumers the confidence to bring forward complaints.

6.4.28 Consistent with the New Zealand approach we suggest three components for effective complaint handling. They are:

- an industry code of practice – with every industry member being required to maintain certain standards as provided for in a code;
- an internal complaints process; and
- a complaints handling authority, dispute resolution or ombudsman

6.4.29 Most jurisdictions require licence holders to provide for in house complaint handling systems which either comply with or to have internal systems consistent with Australian Standard 4269. We support the view that the internal complaint systems should be subject to regular independent audits. Indeed, regular reviews are one of the essential elements of AS 4269. We also take the view that there should be comprehensive public reporting of the system.

6.4.30 In regard to external consumer complaint handling we note Wood's comments:

> International experience is demonstrating, I believe, that statutorily underpinned industry dispute resolution schemes are becoming the most important and effective means for resolving consumer complaints and in improving the performance of the industries involved in resolving their own complaints at first instance.

6.4.31 We note there is also in at least one jurisdiction a requirement for internal complaint systems to also comply with the Benchmark for Industry Based Consumer Dispute Resolution Schemes (released by the Department of Industry, Science and Tourism). We believe conformity with the Australian Standard on Dispute Management (AS 4608) should also be an integral part of handling complaints. This Standard provides a guide for the development and application of an effective dispute management system. The elements described in the Standard may need to be adjusted to meet the needs of different types of organisations and organisational structures.

6.4.32 On balance we take the view that it is preferable for external complaint handling schemes to be non-statutory, and funded directly by the industry. We believe the mechanism of requiring companies to belong to schemes by license condition has proved to be very satisfactory. As we noted earlier, the Gilbert and Tobin / NERA paper appears to overlook the use of licensing for this purpose. It is of course crucial that the ombudsman / complaints authority is, and is perceived by the public as, independent of the industry. This can be achieved by establishing such schemes as companies limited by guarantee and governing them with boards comprised of equal numbers of industry and consumer movement appointees. There are satisfactory models for ensuring appointees with appropriate experience, expertise and in whom consumers and consumer organisations can repose confidence. An alternative of having a purely industry appointed board and a 50 / 50 industry / consumer council to stand between it and the ombudsman has some governance and management drawbacks.

6.4.33 We think there are three key features that make non-statutory schemes preferable:

- Created by the industry - The fact that the schemes are created by the industry means they have a sense of ownership and an investment from which they will want to benefit. There is in our view a strong positive effect on the development of a compliance culture and on developing a positive attitude to consumer complaints as a mechanism for improvement of company

performance.

- Engagement between industry and consumer movement - The fact that these schemes are jointly managed by industry and consumer appointees to their boards assist greatly in developing a collaborative approach to solving market problems
- Determinations - The fact that these schemes operate at no direct cost to complainants and can make determinations binding on industry participants with no appeal, but not binding on complainants makes for a much more efficient process of complaint / dispute resolution.

6.4.34 We note that a number of *memoranda of understanding* between ombudsman and regulatory agencies bodies. We consider them to be an important component of provision of information in relation to complaint handling and identification of systemic issues. We consider these an important means of resolution and identification of issues.

A national ombudsman scheme

6.4.35 As we noted earlier we did not find strong support for establishment of a national ombudsman scheme. We think that a national scheme could work quite satisfactorily. It might be necessary to have deputy ombudsman located in each capital city and if so there would only be limited economies of scale advantages.

6.4.36 We think there would be advantages in having a national ombudsman if there is a significant shift from state / territory to national in consumer protection regulatory responsibilities insofar as the interaction between a national regulator and a national ombudsman would be more effective than between a national regulator and eight separate complaints / disputes agencies.

6.4.37 Even with a continuation of consumer protection regulatory responsibility at state / territory level a national ombudsman scheme could be beneficial provided that it brought all jurisdictions up to best practice in terms of complaint / dispute gathering and resolution. It could also be beneficial insofar as it had the effect of encouraging all regulatory agencies and companies toward best practice.

6.4.38 We think that it should be possible for a national ombudsman scheme to be supplemented as individual jurisdictions see fit. So, for example, the Essential Services Consumer Council in the ACT could continue to perform some of its functions, particularly in relation to its hardship case management system, in the ACT and operate with a memorandum of understanding with the national scheme.

6.4.39 Notwithstanding the foregoing, the Australia and New Zealand Energy and Water Ombudsman Network (ANZEWON) appears to us to be operating effectively to achieve best practice standards amongst the ombudsman schemes and provides many of the benefits a single national scheme would offer.

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ATTACHMENT A: LIST OF JURISDICTIONS CONSIDERED AND BODIES CONSULTED

Overseas jurisdictions considered

- United Kingdom – Office of Gas and Electricity Markets (OFGEM), the Gas and Electricity Consumer Council (Energywatch);
- New Zealand - Electricity Commission, Electricity and Gas Complaints Commissioner, Powerswitch;
- Arizona – Arizona Corporation Commission; Residential Consumer Utility Office;
- Illinois – Illinois Commerce Commission, Citizens Utility Board;
- Maine – Public Utilities Commission, Office of the Public Advocate;
- Ohio – Public Utilities Commission; and
- Oregon – Public Utilities Commission, Citizens Utility Board.

Bodies consulted:

Australian Energy Regulator

Independent Pricing and Regulatory Authority

Essential Services Commission (Victoria)

Queensland Department of Energy

Queensland Competition Authority

Essential Services Commission (South Australia)

Independent Competition and Regulatory Commission

Energy and Water Ombudsman NSW

Energy and Water Ombudsman (Vic) Ltd

Energy Complaints Protection Office

Energy Industry Ombudsman (SA) Ltd

Essential Services Consumer Council (ACT)

Utility companies:

ACTEWAGL

Energy Australia

Community sector organisations

NSW Council of Social Service

Victoria Council of Social Service

SA Council of Social Service

Consumer Law Centre of Victoria

Consumer Law Centre of ACT

ATTACHMENT B: CHECKLIST - CONFORMANCE WITH THE AUSTRALIAN STANDARD ON COMPLIANCE PROGRAMS AS 3806

STRUCTURAL ELEMENTS

COMMITMENT

- What levels of reporting of compliance with applicable laws are there to the CEO and the Board and/or its committees?
- Is there a senior manager who has regulatory compliance as part of there responsibility
- Does the company have a Compliance Manager? At what level of seniority is this person?
- Does the company have a dedicated regulatory compliance budget?

COMPLIANCE POLICY

- Does the company have a compliance policy that is visible throughout the organisation?

MANAGEMENT RESPONSIBILITY

- What is the "chain of command" at management level for regulatory compliance?
- What are the relative responsibilities of the compliance manager and the relevant line managers concerning ensuring compliance with regulations?

RESOURCES

- What sorts of resources are devoted to compliance with legislation including but not limited to:
  - People
  - Legislation and guidelines
  - Access to legal advice
  - Contemporary compliance management and legal obligations reference material,
  - Professional development for compliance professionals

CONTINUOUS IMPROVEMENT

- What action, if any, is taken to continuously improve the process of compliance with laws?

OPERATIONAL ELEMENTS

IDENTIFICATION OF COMPLIANCE ISSUES

- Has there been any systematic analyses done of the company's regulatory requirements/risks?
- What sources has the organization used to work out its compliance

requirements, for example:

(a) Common law

(b) Legislation, including statutes, regulations and mandatory codes.

(d) Permits, licenses or other forms of authorization.

(e) Orders issued by regulatory agencies.

(f) Judgments of courts or administrative tribunals.

(g) Customary or indigenous law.

(h) Treaties, conventions and protocols.

- Other compliance requirements may include:

  (a) Agreements with community groups or non-governmental organizations.

  (b) Agreements with public authorities and customers.

  (c) Organisational requirements.

  (d) Voluntary principles or codes of practice.

  (e) Voluntary labelling or environmental commitments.

- Is there any process for receiving timely advice of changes to laws, regulations, codes and other compliance requirements to ensure ongoing compliance for example from:

  (a) arrangements with legal advisors.

  (b) being on relevant regulators' mailing lists.

  (c) membership of professional groups.

  (d) subscribing to relevant information services.

  (e) attending industry forums and seminars

OPERATING PROCEDURES FOR COMPLIANCE

- Have the types and levels of controls shall be designed with sufficient rigour to meet the compliance requirements particular to the organisation's operating environment and are these controls embedded into normal business processes where possible?
- Such control methods should include:

  (a) Documented operating policies and procedures.

  (b) Work instructions.

  (c) Systems and exception reports.

- Are these controls should be maintained and evaluated periodically to ensure their continuing effectiveness?

IMPLEMENTATION

- Could you describe how these procedures are have been implemented?

COMPLAINTS HANDLING SYSTEM

- What sort of system is there for reporting (e.g. complaints handling) non-compliance with regulations?

RECORD-KEEPING

- What records are kept of compliance activities?
- Do they, for example, include the following?
    - Training attendance and examination records
    - Compliance failure / remedial action register
    - Complaints Register
    - Compliance Plan
    - Compliance agenda, papers and minutes
    - Extracts from Board minutes relating to compliance
    - Audit records, recommendations and action taken
    - Reports submitted to both the Board of Directors and Compliance Committee
    - Position Descriptions
    - Compliance Policies and procedures
    - Evidence folder
    - Monthly Compliance Checklist responses

IDENTIFICATION& RECTIFICATION

- When non-compliance is identified what processes are in place to ensure rectification?

SYSTEMIC AND RECURRING PROBLEMS

- What is done to identify and deal with systemic and recurring problems?

REPORTING

- What system of reporting on regulatory compliance is there up and down the line up to and including the board?
- Who are reports made to, how often and on what matters?

MANAGEMENT SUPERVISION

- What sort of management supervision is in place to ensure that relevant staff are meeting regulatory requirements?

MAINTENANCE ELEMENTS

EDUCATION AND TRAINING

- How do you ensure that staff with compliance responsibilities are competent to do the job?
- What sort of training is undertaken to ensure that relevant staff and managers are aware of regulatory compliance requirements relevant to their day-to-day? How often is this done?

VISIBILITY AND COMMUNICATION

- What activities are undertaken to ensure that the compliance program has a

profile in the organisation

MONITORING AND ASSESSMENT

- What monitoring of conformance to compliance procedures is undertaken? How often and by whom?

REVIEW

- Has there been an independent review of the compliance program and will this be done on an ongoing basis?

LIAISON

- What liaison is there with relevant Commonwealth State and Territory regulatory agencies? How is it done and how often?

ACCOUNTABILITY

- How are staff and management held accountable for regulatory compliance requirements?