

# **Making Energy Markets Work for Consumers in Australia**

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## **Introduction**

This paper is a very broad overview of arrangements in Australia designed to protect consumers generally and individually and advance their interest in respect of energy services. It is based on an examination of regulatory and other documents and interviews with regulators, industry ombudsman and consumer advocates. The views expressed are the writer's.

The departure point for this paper is that it is incumbent upon the state to ensure 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. This paper takes this range to include the utilities services of energy, water and sewerage, communications and public transport.

When these services are to be delivered through markets or quasi-markets, because most have special characteristics on both the supply and demand sides, regulatory arrangements beyond basic consumer protection and competition regulation are 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.

In Australia legislative power in respect of utilities except communications is largely exercised by state and territory legislatures of which there are eight. No two of the eight regulatory regimes are the same, though there are broad similarities. In regard to energy services a recent inquiry concluded that "The energy sector governance arrangements are confused, there is excessive regulation and perceptions of conflict of interest." (Parer) There are differing views on the kinds of regulation needed to produce the best results for consumers. Few would disagree that the higher compliance costs involved when companies are serving more than one jurisdiction and any negative effect on investment due to regulatory uncertainties, other things being equal, and thus the negative consequences for consumer welfare are most undesirable.

Consumer advocates would generally agree that there is more to be done to refine regulatory arrangements to achieve efficiency benefits of liberalisation through removal of impediments to competition where this is possible. They would generally agree that in some areas regulated monopoly provision is more efficient and effective than artificially sustained competition. They would also generally argue that more needs to be done to afford all consumers with adequate levels of protection in relation to information and other aspects of end consumer transactions and to effectively deal with hardship cases. They would concede, however, that the main consumer protection elements are present in the various regulatory regimes.

## Functions

The following are suggested as the main functions involved in making energy markets work for consumers:

- Administration of general consumer protection and competition regulation
- Administration of market sector regulation
- Collection of data on the performance of the market sector
- Education and dissemination of information to consumers
- Education and dissemination of information to suppliers
- Independent mediation/conciliation of complaints/disputes
- Independent arbitration of complaints/disputes
- Management of hardship cases
- Consumer advocacy
  - In relation to regulatory decisions – tariff approvals etc
  - For improved administration of regulation
  - Individual cases
  - For improvements in companies' services
  - For regulatory reform
- Company programmes for compliance with regulation and for continuing consumer service improvement
- Review and reform of regulation of the market sector

## Instruments and agents

The main regulatory instruments are:

- General consumer protection and competition legislation
- Market sector head legislation
- Licence conditions
- Retail codes
- Standardised contracts
- Hardship policies/protocols
- Internal complaint/dispute policies/codes
- Company compliance programs

And in Australia the agents involved are the following organisations:

- Australian Competition and Consumer Commission (ACCC <http://www.accc.gov.au/>)
- State/territory statutory essential services regulatory agencies - e.g. the Independent Pricing and Regulatory Tribunal of New South Wales (IPART <http://www.ipart.nsw.gov.au/>) and the Essential Services Commission of Victoria (<http://www.reggen.vic.gov.au/>)
- Industry Ombudsman –m e.g. the Energy and Water Ombudsman NSW (<http://www.ewon.com.au/>) and the Energy and Water Ombudsman Victoria (<http://www.ewov.com.au/>)
- Relevant government departments
- Specialist utilities consumer advocacy organisations – e.g. the Consumer Utilities Advocacy Centre ([http://www.consumer.vic.gov.au/cbav/fairsite.nsf/pages/of\\_about\\_cuac](http://www.consumer.vic.gov.au/cbav/fairsite.nsf/pages/of_about_cuac)) and the Utility Consumers Advocacy Program (<http://www.piac.asn.au/system/ucap.html>) auspiced by the Public Interest Advocacy Centre - <http://www.piac.asn.au>)
- General consumer advocacy organisations

- Social welfare organisations
- Consumer advocacy agencies established to provide services to disadvantaged groups

The paper will proceed to examine regulatory and related arrangements in relation to the functions listed above.

### **Administration of general consumer protection and competition regulation**

The Trade Practices Act (TPA) is the basis for national general consumer protection and competition regulation and the regulatory agency, the Australian Competition and Consumer Commission, has power to administer this Act in respect of energy markets generally. Having a “whole economy” regulator is important to achieve consistent regulation of markets and to guard against “capture” of specific market sector regulators by the companies they regulate. Memoranda of understanding between whole economy regulators and specific market sector regulators are used to avoid duplication of effort. It would usually be the case that a particular matter would be dealt with by the specific market sector regulator unless the powers of the whole economy regulator were more appropriate.

The ACCC also has certain regulatory functions specific to energy markets to promote competition principally by removing barriers to market entry.

### **Administration of market sector regulation**

Typically this function is undertaken by a statutory agency at the state/territory level with legislated powers and responsibilities for the regulation of essential services utilities in general. Legislation usually provides for government to give only limited direction to the agency to undertake inquiries.

The function involves regulating prices, service, promoting competition and facilitating market entry by:

- determining prices and approving 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.
- setting standards for natural monopoly services through enforceable codes of conduct, and setting financial and other incentives for regulated businesses to meet key performance standards.
- Issuing guidelines on interpretation of specific licence or code obligations and approving market rules to assist consumers to exercise choice in newly competitive markets.
- Either administering a consumer protection framework and an independent dispute resolution process or ensuring that consumers are otherwise effectively protected and have access to independent dispute resolution.
- Issuing licences to new entrants and existing suppliers of essential services that set out licencees’ rights and obligations.
- monitoring, auditing and enforcing compliance with the regulatory obligations set out in licences and other regulatory instruments and publishing related reports.
- Determining disputes in relation to natural monopoly infrastructure services.

### **Collection of data on the performance of the market sector**

This would normally be undertaken by the state/territory statutory agency. The ACCC and other agencies may also be involved. Data is made public, but with anonymisation as appropriate.

### **Education and dissemination of information to consumers**

Again the state/territory statutory agency normally is generally responsible for this function, but a number of other agencies contribute including general consumer protection agencies, consumer advocacy agencies, complaint/dispute handling agencies and companies themselves.

### **Education and dissemination of information to suppliers**

The state/territory statutory agency, the ACCC, the industry ombudsman and other complaint/dispute handling agencies have the main responsibility for this function.

### **Independent mediation/conciliation of complaints/disputes and Independent arbitration of complaints/disputes**

In most jurisdictions in Australia (and in New Zealand) these functions are the responsibility of an industry ombudsman. Industry ombudsman schemes have been operating quite successfully for a number of market sectors over a period of years in Australia as they have in the UK in the financial services sector. These are non-statutory agencies and can generally be described as “co-regulatory” rather than self regulatory as they are established with some level of government involvement and have governance structures that involve both industry and consumer representatives. In the case of utilities industry ombudsman in Australia licence conditions require companies to belong to approved schemes. Schemes are established by deed of agreement amongst companies. Companies agree on the powers and responsibilities of the ombudsman, commit themselves to abide by rulings and to contribute to the financing of the ombudsman’s office.

Key characteristics are:

- There is no charge to complainants.
- Complainants lose no rights in respect of the formal legal system.
- Monetary awards may be made (typically up to \$20,000 and higher amounts by agreement between the parties).
- Whilst being required to have regard to the law and codes of conduct, Ombudsman are able to judge matters on the basis of fairness.

Unlike statutory mechanisms, for companies Industry Ombudsman rulings are final. For them there is no recourse to the formal legal system, so consumers have no concern about delay through appeal processes. Unsatisfied consumers with the necessary resources can of course take their own legal action.

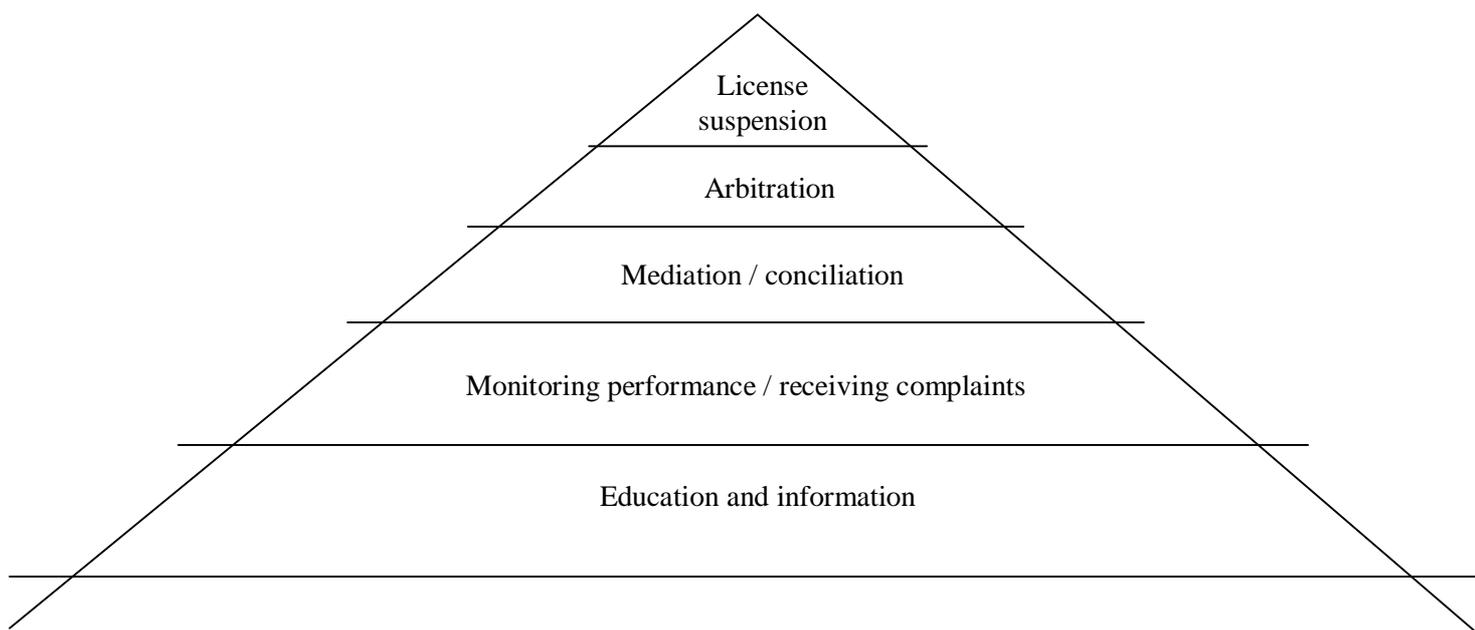
Again unlike statutory mechanisms Industry Ombudsman schemes seem to engender a strong sense of ownership of the market sector’s problems by companies. Companies together are responsible for resourcing Industry Ombudsman schemes which makes a strong incentive for companies to lift their consumer service performance. Utilities industry ombudsman in Australia have generally had no difficulty in obtaining the resources they require. Incidentally the burden lifted from state consumer protection agencies allows them to pick up other priorities. Statutory mechanisms can be designed to contain costs of complaints/disputes to the market sector, but because companies see them in a “government

versus industry” light they do not seem to be able to develop the kind of cooperative problem solving approach which characterises industry ombudsman schemes.

It is common to think that one agency should not attempt both the mediation/conciliation function and the arbitration function. This does not seem to have been problematical for industry ombudsman. Typically ombudsman organise their offices such that they are not personally involved in matters in respect of which there is any likelihood of a determination being required.

Generally utility industry ombudsman schemes are viewed as very successful by companies, consumer organisations and government. On most performance indicators they are proving effective and efficient. Costs per case are low, speed of resolution is high and accessibility measures are high and relatively even across demographic groups and regions, both urban and rural.

The proportion of disputes that are not resolved through mediation/conciliation and require determination is very small indeed. Thus these schemes seem to support quite strongly enforcement pyramid thinking in regulatory theory. This theory says that the more seamlessly and readily matters can be escalated up the hierarchy of enforcement/compliance measures the flatter will be the pyramid – i.e. the greater the activity in the lower order measures. The measure at the top of the pyramid is for the regulator to exercise in the unlikely event of a company’s refusal to comply with the ombudsman’s determination. It seems likely that the regulator would take such a matter extremely seriously though clearly availability of alternative supply would be a consideration.



In jurisdictions which utilise statutory mechanisms resolution of general consumer complaints and disputes has not been as efficient and effective.

### **Management of hardship cases**

In most jurisdictions this is ultimately the responsibility a government department which has carriage of social welfare programmes. Companies are generally required to follow protocols in relation to hardship cases which involve referral to the relevant government department.

Many cases come to the industry ombudsman who may collaborate with the government department in their management. Consumer advocates opine that in most jurisdictions too often protocols are not followed and cases do not get into the appropriate process. They say that too often when they do they are unsatisfactorily managed. Many hardship cases are complex and the people involved are likely to be experiencing multiple difficulties – employment, housing, health, family breakdown etc.

Consumer advocates say that while most jurisdictions in Australia have not been particularly successful in providing the services these people require in a co-ordinated way, the greatest progress has been made in the Australian Capital Territory. This being a small jurisdiction (a population of less than 300,000), co-ordination of services is somewhat easier. The fact, though, that the task is the responsibility of a small independent agency, the Essential Services Consumer Council, rather than a large department seems significant. Members of this Council are part-time and most have a background in some aspect of consumer advocacy. Supported by a small secretariat, they individually take responsibility for a number of cases. The Council has had a high level of success in assisting people through financial difficulties and back to a position in which they are able to manage their utility expenditure. This includes providing assistance in energy conservation. To employ such a system for larger jurisdictions would involve establishment of multiple similar councils to cover regions of the jurisdiction. This of course implies a fairly high level of delegation from central authority. The system appears quite resource intensive, but indications are that there is a positive cost benefit in terms of limiting the flow on effects of poorly managed hardship cases.

### **Consumer advocacy**

- **In relation to regulatory decisions – tariff approvals etc**
- **For improved administration of regulation**
- **Individual cases**
- **For improvements in companies' services**
- **For regulatory reform**

Most consumer advocacy is undertaken by:

- Industry Ombudsman
- Specialist utilities consumer advocacy organisations
- General consumer advocacy organisations
- Social welfare organisations
- Consumer advocacy agencies established to provide services to disadvantaged groups

Advocacy by an industry ombudsman is largely limited to advocacy for improvements in companies' services, for regulatory reform and improved administration of regulation. In order to be and be seen to be impartial such advocacy does have to be somewhat more restrained than that of other agents of advocacy.

Specialist utilities consumer advocacy organisations may undertake all forms of advocacy, but their limited resources mean they tend to be strategic and their funding conditions (from government) would normally require that they are active in relation to regulatory decision-making processes. General consumer advocacy organisations and social welfare organisations have large agendas and stretched resources and are thus very strategic in their work on utilities issues.

Consumer advocacy agencies providing services to disadvantaged groups will often become involved in advocacy in hardship cases.

Overall the level of resources available for advocacy seems to fall short of needs. Some state governments have relatively recently started funding specialist utilities consumer advocacy

organisations. Nation wide this appears to amount to around \$2 million per annum. Energy companies have recently set up a fund to assist advocacy and potentially \$1 million per annum is available. Because of variations in mechanisms from jurisdiction to jurisdiction it would be a large exercise to collect the required information to make an accurate estimate the national total for all advocacy in relation to utilities essential services. It seems unlikely to come very close to \$10 million per annum.

### **Company programmes for compliance with regulation and for continuing consumer service improvement**

Some very limited research suggests that this is very patchy across the market sector. Perhaps this is not surprising as many companies have evolved quite recently from government agencies unused to having to comply with a range of regulatory instruments and without a strong consumer service culture. While performance monitoring is undertaken by the relevant regulator aided by the work of the ombudsman there would seem to be value in some greater intervention to encourage and assist companies to develop and operate such programmes. This is particularly relevant in respect of protocols for dealing with hardship cases. Having companies operating effective compliance programmes is the best way of minimising the number of such cases that do not get dealt with through the appropriate processes.

### **Review and reform of regulation of the market sector**

There is general provision for this function in the regulatory arrangements. Effectiveness of review will depend to a large degree on the capacity of consumer advocates to engage in review processes and this capacity is inadequate at present.

### **References**

**Towards a Truly National and Efficient Energy Market Warwick Parer  
Commonwealth of Australia 2002**

#### **Appendices: Examples of regulatory instruments**

##### NSW

- INDEPENDENT PRICING AND REGULATORY TRIBUNAL ACT 1992
- NSW Electricity license conditions

##### ACT

- ACT Utilities Act
- ACT Consumer Protection Code 2003

##### Victoria

- Retail Marketing Code