DEMOCRACY *and* Consuming Interests

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Have Victorian households lost any real control over the price and quality of their electricity supply?

The history of privatisation shows that it not only succeeds in rolling back the state, it is also adept at rolling over people and democracy — particularly when they are quiescent.[1]

The International Covenant on the Rights of the Child refers specifically to the provision of water. Water is essential to life. We simply cannot go without it. While energy is not included as a 'human right' in the international conventions — it clearly is not as fundamental as water — Australians probably accept access to cooking food, heating and lighting as 'essential services', and hence as a 'right'. For most urban Australians reliable and cheap gas and or electricity have been a given for a number of decades. Widespread corporatisation and privatisation of utilities in Australia, however, raises the issue of whether water and energy are essential services to which we have a basic 'right', or are services just like any other commodities that can be allocated by the market. The notion of 'utility rights' has widespread appeal but is seemingly anachronistic in a society that has largely stopped asserting the right to a guaranteed income or housing. In this sense the demand for utility 'rights' is an indicator of a deeper anxiety, concerning our 'right' to control how our services will be delivered. As Ernst and Webber suggest above, diminution of democratic rights would appear to be a key feature of privatisation.

As the reform of the Victorian electricity industry is already a number of years down the track it is possible to use it as a case study in how 'people and democracy' were rolled by privatisation, and how various conceptions of 'rights' were involved. I will focus on the new industry structure, especially in relation to domestic customers and pricing, to demonstrate the essentially political nature of privatisation. By doing so it is possible to delineate the contradiction of a consumer rights framework in the context of privatisation.

Introduction to privatisation

The 'reform' of the Victorian electricity industry is the Kennett Government's flagship privatisation. It is setting the pace and style of utility reform around the nation. The changes have been more radical, faster and less mediated by dissent than some other States. The Kennett Government carved up the former State Electricity Commission of Victoria (SECV), in the year of its 75th birthday, and sold off significant portions within the Government's first term. This was possible even in the face of strong public disapproval because of the Government's large parliamentary majority, a weak opposition and a very successful scare campaign around State debt. Furthermore, community-based organisations risked de-funding if they protested too much. As it was, the Energy Action Group (EAG), a statewide, energy advocacy service for low income households barely had the chance to dissent. It was de-funded in 1993 on the eve of the break up of the industry. This happened despite offers of funding from both the SECV and the Gas and Fuel Corpora-

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tion. It is now four years since the industry was split up and two since most of the distribution sector was privatised, and a year or so since electricity generation was sold.

The reforms are tortuously complex for any lay reader to understand (and this is decidedly to the Government's advantage). It is necessary to give an outline of the restructured industry if one is to grasp the nature of the changes. The Victorian industry now consists of four sectors: generation, transmission, distribution and retail sectors. Generators compete with each other to sell electricity into:

- the wholesale market; or
- direct to retailers; or
- direct to some customers.

Transmission (the high voltage wires) has been sold as a single monopoly. Distribution (the low voltage wires) likewise is a monopoly. However, the pre-existing distribution monopoly that covered the whole of Victoria has been broken up into five geographical franchised areas. Distribution is literally the transportation of the electricity. Retailing, on the other hand, is the selling of energy, and a market now exists in energy trading. The five distribution businesses, United Energy, Solaris, Eastern Energy, Powercor and Citipower each have a retail arm, and a number of independent retailers (including the NSW electricity companies) are now trading in Victoria.

The retail arms of the distribution businesses are supposed to be 'accounting separated' from the distribution side of the business. That is, there are supposed be 'Chinese walls' between them so that the costs and profits of each part cannot be confused with the other.

Throughout the reforms there have been three different 'rights' paradigms argued. The first, most obviously, is that espoused by the Kennett Government and its New Right advocates. In their neoclassical economic view, free market competition efficiently allocates resources, delivering choice, improved service and lower prices to consumers. Legislative guarantees on access to service and prices constrain markets, and are an imposition on the freedom of the individual. Diametrically opposed to this is the 'citizenship' model advocated by people on the political left and social justice advocates who suggested that the market engenders inequality by definition, therefore privatisation diminishes many individuals' access to essential services, and reduces the scope for a collective (socially informed) response. The third paradigm is that of 'consumer rights'. In the Victorian utility experience this largely manifested itself as the gaining of procedural rights, and was based on an assumption that the change of ownership did not create fundamental change, but rather regulation was the key to obtaining consumer benefits, some of which did not exist previously under the SECV.

Of markets and monopolies

In mid-1995 the 'Community Response to the Privatisation of Gas, Electricity and Water Project', established by Hotham Parish Mission of the Uniting Church in Australia, the Victorian University of Technology and the People's Committee for Melbourne engaged a consulting economist to write a paper on the wider economic aspects of the electricity reforms. What resulted was a 'report card' on the Government's reforms, which demonstrated a series of discrepancies between the rhetoric of the reform and the reality that had been enshrined in the legislative framework. The economist, Francis Grey, shifted the emphasis from the public/private debate to an investigation of the so called market structure.

Grey concluded that:

> overstating the role of the market, under powering the ORG [Office of the Regulator-General], implementing inadequate objectives and understating the on-going role of the monopoly, while boosting prices to hide a cross-subsidy have seriously undermined any likely efficiency gains of the reform process.[2]

In other words the industry is still highly monopolised, and where markets had been brought into existence they are far from perfect and totally undeserving of Treasurer Stockdale's description of 'fully competitive'. Furthermore, 'efficiencies' have not been forthcoming. All the reform has achieved to date is a re-distribution of wealth.

Despite the rhetoric about competition the Government does recognise the monopolies (as permanent features in transmission, distribution and temporarily in domestic retailing until 2000). The Government established an 'independent' regulator (the Office of the Regulator-General), who will from 2000 onwards set the monopoly charges (such as the distribution charges), and has instituted customer charters and codes. The charters and the like have had input from a customer consultative committee made up of chosen customer representatives, including consumer and welfare organisations. At least on the surface, domestic customers appear to be represented and protected by formal processes and the participation of customer lobbies. The establishment of an electricity ombudsman, for example, was hailed by all as a great achievement.

What is contained within the apparent contradiction of a 'fully competitive electricity industry' that acknowledges monopolies? The answer to this lies within the Victorian Government's dual ambition of privatisation and delivering lower electricity prices to business and industry. Despite the strident claims that markets are efficient and would result in lower prices, the Government was simply not willing to take the risk of leaving it to the market. Likewise the Government recognised that privatisation proceeds could be bolstered by minimising the risks to the investors that the market posed.

It would have been an extraordinary political risk for the Government to sell the SECV as an integrated monopoly. Likewise, it would have been hard to truly justify how private ownership and management would have been able to deliver lower prices when the SECV was unable to do so. The Government, as adherents to market ideology, had to sell 'competition' to sell privatisation. The electorate, as opinion polls demonstrate, never believed in it. The business community and the media, however, wholeheartedly embraced the concept. As a consequence, there is a widespread fundamental lack of understanding among commentators about the role the monopolies play.

The image of 'market' has been important because it is even determining how some opponents perceive the changes. The power of suggestion is amply demonstrated by market-orientated responses of organisations such as 'Church Power', and 'Cooperative Energy' who both seek to exploit the buying power of the tens of thousands of member small customers by aggregating them so they can bulk purchase. The intent of the former is to influence electricity companies policies towards low income households by gaining significant market share (a hybrid consumer/citizenship version of 'rights').

Households go guarantor for privatisation

Domestic and small business customers do not enter the retail market until the year 2000. Because there is both a distribution and retail monopoly over households until that time, domestics are charged a 'Maximum Uniform Tariff' of 12 cents a kilowatt hour which was set by the Government. The distribution monopoly is a permanent feature.

In 1992, on the eve of the restructuring of the electricity industry the Victorian Government doubled the supply charge (the standing charges) and lifted prices by 10% for domestics. Victorian households now pay historically and comparatively high prices for their electricity. According to Fitzgerald and Dreyfus,[3] these increases will leave some poorer households up to $400 a year worse off in 2000 (after five years of government mandated 'cuts') than if the 1992 price had been pegged to the CPI. The effect of these high charges is that households have gone guarantor for the Victorian reforms.

For at least three years there has been no accounting separation between the distribution monopolies and their retail arms. The current guidelines may be too late and inadequate. While it may seem a technicality, the outcome has very real impacts. The retail arms of the distribution businesses have had the opportunity to subsidise their contestable customers (the big industrial and commercial customers) using monopoly rents sourced from their captive domestic customers. The savings being made by large electricity users do not necessarily arise from 'efficiency gains' (made as a result of competition) but may be being paid for by households. Ironically, a number of free market proponents have noted that this is what the NSW retailers are doing (domestic customers in NSW are paying for the competition in Victoria!) and are pushing for the privatisation of the electricity industry there as a solution.

What they are failing to acknowledge is the inappropriate coupling of distribution and retailing. Retailing is merely a license to trade — it does not involve any of the electricity assets that make or move the commodity. Competition, therefore, does not require the privatisation of electricity assets. After all distribution (the operational of the poles and wires) was and always will be a monopoly and its ownership is unrelated to energy retailing. Selling monopoly distribution businesses with guaranteed revenue streams, coupled to a retail arm was the only way the Victorian Government could achieve high returns on the sales and achieve an image of competition. If they had sold the two separately, only the distribution would have sold. Retailing, as experience now shows, is a lot of hard work for narrow and uncertain margins. Coupling the distribution and retail arms also offered a safety net for the reforms. Price cuts to large industrial and commercial users had to occur quickly otherwise the Government risked losing the support of this influential group. But the cost structures of the SECV were at best guesstimates. There was a risk that in the break up of the SECV revenue streams might not be properly allocated so as to guarantee each new business enterprise sufficient profits that would enable cuts to the big electricity users. The Government chose to pump up domestic prices to provide a guaranteed revenue stream in case they got the numbers wrong.

Post 2000 — regulated charges

The chances of households successfully contesting the pricing inquiry (obtaining cuts) for the setting of regulated charges is small. The Government set in place a number of mechanisms to protect the profits of the distribution businesses, including a straight prohibition on the regulator delivering 'big cuts'. Just in case that is not sufficient, information disclosure that would enable any kind of meaningful case to be presented to the regulator is virtually nonexistent. At present there is nothing more than the little information released (at a cost) by the Australian Securities Commission in the public arena on which to base a rate case. Once the electricity businesses were corporatised they were exempted from freedom of information provisions. However, the Office of the Regulator-General is still covered (unless the proposed changes to the *FoI Act* undermine that as well). Just in case all that fails, the Treasurer, Mr Stockdale stated in Parliament that the kind of information needed to argue a pricing case will be declared 'commercial in confidence' despite the information relating to the monopoly provision of an essential service. By way of contrast, in the USA, electricity companies are required to disclose all of their financial information.

Post 2000 — the market

If the Government's rhetoric is to be believed, the domestic tariff should drop by as much as (possibly) 6 cents a kilowatt hour in metropolitan Melbourne after the year 2000. This prediction is premised on the existence of competition in the domestic retail sector. A closer look would suggest that competition is somewhat more theoretical than substantive. A robust market will only exist if retailers are anxious to get the business that households offer. The difficulty is threefold. First, the cost structures are not favourable. The amount of electricity used by households in relation to the overheads involved means households are not worth the effort. Second, the ability of households to enter and exit the market in a meaningful way is highly constrained. Third, the five distribution businesses are an oligarchy that has a vested interest in limiting competition in the domestic retail sector. In fact, the internal cost structure of the two rural distribution businesses probably does not leave a great deal of scope for them to offer lower household prices so this really only leaves three suppliers. Existing independent retailers are chasing the big money, and new ventures like co-operatives face significant barriers to entry. The future market for retail domestic electricity is a far cry from a classic free market. The market component of domestic electricity prices are highly unlikely to drop significantly.

Windfall profits

The Government also recognised that if they got the sums right in regard to allocating the revenue streams to each new business, then the domestic 'maximum uniform tariff' would result in windfall profits for the distribution businesses. The Government decided to capture this windfall (if it eventuated) through the imposition of a tax called a 'franchise fee' on the distribution businesses. Because this windfall tax reflects the excess profits the distribution businesses make in the absence of competition (in retailing) the fees do not continue beyond 2000 when households become contestable.

The Franchise Fees allow an idea (in money terms) of the over-charging of domestic customers. At the time of writing I had not done a full tabulation of the known figures but by referring to the Electricity Industry Regulatory Statement issued by the Office of the Regulator-General in 1995, United Energy was scheduled to pay approximately $342 million in the five year period until 2001. Powercor has not

been required to pay franchise fees at all, presumably because its cost structure as a rural distribution business covering a vast geographical area with a low population means the current charges closely reflect the cost of supply to the western half of the State of Victoria. Eastern Energy, Citipower and Solaris pay varying amounts, with Solaris and Citipower paying something similar to United Energy. How the figures are determined by the Government is not publicly known.

The actual cost of supply for the domestic sector is largely obscured by the possible cross-subsidisation between customer classes and the franchise fees. Without full access to the financial data of the electricity companies, households will have no idea what benchmark they should be looking at in terms of contesting the pricing inquiries (on regulated charges) nor to what extent the market component of the price should fall after 2000. The high price households pay now effectively guarantees that domestic users of electricity will always pay too much.

Consumer power?

This analysis has been about demonstrating how Victorian households are underwriting the privatisation of the Victorian electricity industry. With the exploitation of domestic customers built into the structure of the reforms, households were necessarily denied democratic instruments that could challenge this state of affairs. Yet households have been formally represented throughout the reform process by consumer organisations. Ernst and Webber have made this observation:

> Privatisation of public utilities involves more than transferring ownership and restructuring water and energy industries. It also seeks to redefine the relationship between the individual and the state, and in particular the way in which individual and social needs for essential utility services are met. At its heart, the privatisation project is founded on consumerism.[4]

Victorians did not have a well-defined set of customer rights under the old publicly owned utilities. The SECV did, however, undergo frequent Parliamentary inquiry, was subjected to a public Ombudsman and had to contend with a funded specialist customer lobby. Nevertheless, procedural rights were vague. Since the reforms began, customer charters, codes of conduct, complaint mechanisms, league ladders and the like have been implemented. Once again what has actually been achieved is an 'image' that belies the reality. On paper it is now more difficult for one of the new electricity companies to disconnect a customer than under the SECV, but the oversight is so poor at present that anecdotal evidence suggests the companies largely ignore such paper constraints. The problem with procedural rules is that unless behaviour can be independently verified and enforced the rules will mask actual practices. The Victorian regulatory regime is bereft of any real monitoring, reporting or enforcement. Information collection on things like disconnection and unplanned outages has been easily manipulated by the electricity companies.

Whitfield observes that the emphasis on individual rights within the context of increasing commercialisation of services means individual grievances are channelled:

> into corporate structures where they can be dealt with as separate complaints within the corporate organisation, standards and concerns. This has obvious advantages for management in responding to and containing issues.[5]

The pinnacle of the consumer containment strategy in Victoria is the 'privatised' electricity Ombudsman. Customers are only supposed to approach the Ombudsman after having attempted to resolve their complaint with the company concerned. Of notable concern is the scarcity of face to face opportunities to deal with the electricity companies. Former SECV offices across the State were closed as a part of the rationalisation process, and many rural customers have to travel considerable distances to get 'personal' service from their newly privatised providers. Another concern is a mounting suspicion that the electricity companies respond to the efforts of advocates working on behalf of individual clients but are duplicitous in regard to ordinary complaints.

The Electricity Ombudsman, rather than constituted as an officer of the Parliament, is an industry umpire established through Articles of Association. The Electricity Ombudsman exists because it was a license requirement of the electricity companies to participate. The industry funds the scheme, and a true test of who actually controls it is yet to be seen. The problem with such schemes is that they are only as good as the person holding the position. It should be the institutional arrangements that are the guarantee of process and outcome, not the person. Of course the same can be said of the regulator. Indeed the Victorian regulatory regime has been roundly condemned as being hamstrung by its lack of independence from government. A high priority of the Australian Competition and Consumer Commission (ACCC) in its position as national electricity regulator is to see State jurisdictional regulators truly independent of their respective governments.[6]

The issue of 'quality of supply' (power surges and blackouts) is an interesting double standard on the Government's part. Private sector disciplines could apply in the form of common law rights to sue for damages. But the Victorian electricity industry, as with utilities generally in Australia, are shielded from the product liability provisions of the *Trades Practices Act*. As most Victorians would unhappily inform their interstate counterparts, quality of supply has declined since privatisation, raising the issue of some application of common law rights in this area. Some, such as the ACCC believe that this right currently exists. It remains, however, untested in court. By all accounts it will be left up to the individual customer to pursue it as test case, rather than being taken up by the ACCC itself. The point of the Government not addressing the issue is that the risk (of poor quality of supply) is borne by the customer, not the distribution business. Customers have to purchase power surge devices and insurance to protect their assets. This means the distribution business can cut maintenance, and be more profitable. For the Government, it meant a higher sale price. Once again the customer, rather than being empowered, is victimised.

It is ironic that procedural rights have received so much attention from consumer rights advocates when at the same time domestic customers effectively lost any real control over prices and quality of supply: the two most fundamental aspects of any product. Social justice advocates would clearly argue that access is also fundamental, but access to a large degree is a function of price. In accepting what Whitfield calls the 'consumption relationship' posed by privatisation, the poor have perhaps been unwittingly boxed in against the rail (to use a racing metaphor). The new procedural approach has set a highly defined path that now leads the poor directly to pre-payment meters. Basically there is a set of cues for the consumer within the disconnection process that

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reparations are essential to the reconciliation process, that gross breaches of human rights should not be trivialised, and the obligation under international law to make reparations in such circumstances should not be ignored.

Conclusion

Ultimately, whether the stolen generation are compensated in a manner which is compassionate and appropriate will be one of the biggest tests of the moral fibre of Australian society as we approach the next century and 100 years of nationhood. Only an administrative compensation scheme, as suggested in this article and in the Report, will suffice to achieve this end.

References

1. See 'Long delay for victims of forced removal', *Australian,* 27 May 1997.
2. See Recommendation 3 at p.282 of the Report. See Chapter 14 for a discussion of these issues, except the question of rehabilitation which is discussed in detail in Part 5 of the Report.
3. See 'Reconciliation not compensation', *Australian,* 14 October 1996 and 'Recognition of a past disgrace', *Australian,* 21 May 1997.
4. It is interesting to note that many African Americans are now arguing that an apology for slavery is insufficient; monetary compensation is really required. See White, Jack, 'Sorry Isn't Good Enough', *Time (Australian edition),* 30 June 1997, at p.27.
5. See 'Hundreds prepare to sue for "stolen" Aboriginal lives', *Sydney-Morning Herald,* 4 June 1997.
6. Mossman, M.J., 'Gender Equality and Legal Aid Services: A Research Agenda for Institutional Change', (1993) 15 *Sydney Law Review* 42. See also the Family Court's comments in *McOwan and McOwan* (1994) FLC 92–451 at 80,691.
7. Other ways this is reflected are the inferior status of family law in the legal profession, and the fact that whereas criminal law is a compulsory subject at all law schools (as part of the Priestly 11), family law is rarely compulsory. See Garkawe, Sam, 'Admission Rules', (1996) 21(3) *Alternative Law Journal* 109.
8. For example, in a study carried out in NSW it was found that 64.5% of applicants who were defined under the relevant legislation as 'primary' victims (who represented the overwhelming majority of applicants) were male. See Salmelainen, P., *Criminal Victim Compensation: A Profile of Claims, Claimants and Awards,* NSW Bureau of Crime, Statistics and Research, 1993, at p.8.
9. See Whitney, K., 'The Criminal Injuries Compensation Acts: Do they Discriminate against Female Victims of Violence?', (1997) 1 *Southern Cross University Law Review* 92.
10. This is an anecdotal assumption, but would be logical as more males are employed than women in the community, generally at higher pay (which increases the amount of compensation they would be entitled to), and are more likely to be engaged in occupations that involve elements of physical risk.
11. There was some debate over whether there should be more than one Declaration. See UN Document A/CONF.121/C.2/L.14, 4 September 1985, paragraphs 1–10.
12. For a summary of these justifications (as well as others) see Elias, R., *Victims of the system: Crime victims and compensation in American politics and criminal justice,* 1983, New Brunswick, NJ: Transaction Books, at pp.24–26.
13. The Report relied upon a study by Professor van Boven, *Revised set of basic principles and guidelines on the right to reparation for victims of gross violations of human rights and humanitarian law,* Commission on Human Rights Sub-Commission on Prevention of Discrimination and Protection of Minorities, UN Document E/CN.4/Sub.2/1996/17; found at pp.649–650 of the Report.
14. While there are some human rights mechanisms, such as lodging a communication with the United Nations Human Rights Committee pursuant to the *First Optional Protocol* of the *International Covenant on Civil and Political Rights,* any negative ruling of the Human Rights Committee is in no way legally binding on the Australian Government.
15. For purely pragmatic reasons, I would agree with this limitation on monetary compensation. However, it should be noted that these categories of claimants would still be entitled to other forms of reparation.

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if not heeded will potentially (in the future) automatically result in the offer of a pre-payment in lieu of disconnection. At present the companies are required to gain the approval of the Regulator-General to make the 'offer'. The attitude of the regulator will matter very much. There is no doubt about how attractive these kinds of meters are to electricity companies and how much pressure will be brought to bear on the regulator to make certain that non-compliance on the part of a customer is grounds for an 'automatic' offer of a pre-payment meter. The SECV management also wanted these meters but back in the old days the check and balance was provided by politically vulnerable Ministers having to respond to public pressure. The regulator, as a government appointee, is not subject to public approval in the same way.

Pre-payment meters (being literally pre-payment — not 'pay as you go' as the electricity companies like to promote them) effectively privatise the act of disconnection, curtailing a socially informed collective response to poverty.

Poor Victorian households face a dual threat of continuing high prices and the erosion of concessions. The Victorian Government provides somewhere between 30 and 40 million dollars a year in energy aid grants for households. There are indications that this funding is under threat even though demand for aid has grown. Ernst and Webber make the observation that in Britain the panoply of procedural rights did not provide the solution to the fundamental problem of fuel or water poverty.[7]

Conclusion

The Victorian electricity reforms provide a privatisation case study capable of demonstrating how democratic rights have taken a back seat to a more limited form of consumer rights. Victorian households have lost any real control over the price they pay for their electricity and over the quality of supply. Further, they may have more clearly delineated procedural rights for things such as disconnection, but non-existent or inadequate monitoring and enforcement downgrade the value of these gains. In moving from service delivery based on a notion of rights, informed by ideas of democracy, to a consumption relationship, Victorians are losing the ability to achieve a socially informed collective response to problems such as poverty.

References

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2. Grey, F., *Trading Power: The New Victorian Power Game,* Public Sector Research Centre, University of New South Wales, Sydney, 1996.
3. Fitzgerald, P. and Dreyfus, S., *The Price of Power,* 1995, unpublished.
4. Ernst, J. and Webber, M. above., p.135.
5. Whitfield, D., *The Welfare State,* Pluto Press, London, 1992, p.91.
6. Australian Competition and Consumer Commission, Draft Determination Application for Acceptance National Market Access Code, 22 August 1997, p.xxvi.
7. Ernst, J. and Webber, M., above, p.138.