## PRIVATISATION

# May the force be with you

### *CitiPower v Electricity Industry Ombudsman (Vic) Ltd*: testing the power(s) of the Victorian Energy Industry Ombudsman. BRONWYN NAYLOR comments.

The 1990s has seen fundamental shifts in the role of government in Australia, with major divestment of services previously provided by the public sector, whether by corporatising, by contracting out specific services to the private sector, or by full privatisation. The momentum increased with the adoption in 1995 of National Competition Policy by the State and federal governments. This shift is of course highly controversial in political and philosophical terms; it also has enormous ramifications for issues of accountability, consumer protection, and dispute resolution.

Australia's rush to privatise began in Australia with Australian Airlines, the Commonwealth Bank, Qantas, the state-owned banks and insurance companies and, more recently, the partial sell-off of Telstra. Privatisation of state-owned utilities occurred most rapidly in Victoria, under Jeff Kennett, following the lead of the UK which privatised its utilities in the 1980s. The Victorian electricity industry was transferred to the private sector over 1995–96: the State Electricity Commission was sold off and a number of companies bid for licences to distribute and sell electricity in specific regions in Victoria.

Customers of state-owned utilities had had access to the State Ombudsman and to freedom of information (FoI) legislation, and other avenues of administrative review. These avenues of redress and accountability have been progressively reduced (starting with the exclusion of access to FoI and the Ombudsman with the restructuring of the utilities under the 1992 *State-owned Enterprises Act),* leaving the limited consumer protection mechanisms available in the private sector. To make privatisation more palatable, therefore, there was to be an industry ombudsman scheme (similar to that established in 1991 in the banking industry).[1] Successful licensee companies were required to become a member of an Ombudsman scheme, and the Electricity Industry Ombudsman was established (the EIOV, now the Energy Industry Ombudsman, since the gas industry joined the scheme). The Ombudsman investigates and resolves complaints about the provision or supply of electricity (or gas) services by a member to a customer, and can make a binding determination up to $10,000, or to $50,000 by consent. Her decision is binding on member companies, but the consumer has 21 days to accept the decision, or go to another forum such as the courts.[2]

The EIOV began operation in 1996; the Ombudsman is currently Fiona McLeod. NSW corporatised its electricity industry and established the EION in 1998. Its Ombudsman is currently Clare Petre.


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The EIOV is a company limited by guarantee. Its memorandum and articles of association provide for a Constitution, and under article 12.2 members agree to be bound by its terms. The Constitution sets out the scheme for dispute resolution. The Ombudsman's jurisdiction is outlined in s.3; s.4 excludes from the Ombudsman's jurisdiction matters such as the setting of prices, government policy, and 'events beyond the reasonable control of a participating company' — the clause in dispute in the *CitiPower* case.

## The CitiPower case

Privatised electricity supply in Victoria appeared — at least in the early days — to have an unacceptably high rate of power cuts and surges, judging by the frequent press reports of such events. Consumers fear that, with privatisation of utilities, expenditure on maintenance is only too likely to be reduced, and staffing cut to the minimum, as profits are redirected into shareholders' dividends. The black-out of Auckland following electricity privatisation appeared to bear out this fear,[3] as did Sydney's 'water crisis' and Victoria's 1998 gas crisis. The EIOV found that half of all the more serious electricity complaints in 1997-8 involved such power 'outages', and related damage to household goods and appliances.[4]

Three customers who had appliances damaged by a power surge in November 1996 took their claims for compensation to the EIOV in 1997 and were awarded damages totalling $7851.55. The electricity supplier, CitiPower, then challenged the decision in the Victorian Supreme Court, providing the first opportunity for judicial consideration of the scheme.[5]

CitiPower was unsuccessful. Warren J in the Supreme Court — who recently made remarks highly critical of the Victorian government in the recent Intergraph Ambulance documents case — endorsed the Ombudsman's interpretation of the supplier's responsibility to maintain adequate power supplies to customers. She also confirmed the power of Victoria's Energy Ombudsman to make decisions with minimal judicial interference.

CitiPower had applied for declarations that the Ombudsman had been acting outside her jurisdiction, and for orders that the Ombudsman was in breach of the contract constituted by the memorandum and Articles of Association of EIOV and the Constitution. Its argument was based on s.4.2(g) of the industry Constitution, which excluded jurisdiction over complaints about 'events beyond the reasonable control of a participating company ... bearing in mind current law and reasonable and relevant industry practice'. CitiPower objected to the Ombudsman's finding that, although CitiPower was not directly responsible for the power surge, it had still been within the company's 'reasonable control', and the Ombudsman therefore had jurisdiction to determine the dispute.

CitiPower buys electricity from the statutory authority Victorian Power Exchange (VPX). VPX, in turn, had contracted with the private transmission company GPU PowerNet for the maintenance of the relevant power exchange. The Ombudsman found as fact that the interruption to the power supply occurred as a result of the negligence of an employee of GPU PowerNet, that CitiPower had no control over the power surge and that it was 'not directly responsible for the damage suffered by each of the claimants' (transcript p.8). She concluded nonetheless that, given the contractual relationship between CitiPower and VPX, and bearing in mind 'current law and reasonable and relevant industry practice', CitiPower was ultimately responsible. In reaching this decision, the Ombudsman took account of her knowledge of 'Use of System' agreements such as that between CitiPower and VPX, under which CitiPower could readily have made arrangements to avoid any interruption to supply (but did not).

The Supreme Court rejected CitiPower's argument that, having found that CitiPower was not directly responsible, the Ombudsman then had no jurisdiction to consider the complaint. It held that the Ombudsman had properly used her knowledge of the industry and the relevant agreements to conclude that CitiPower had had the ability to make appropriate arrangements to protect its customers' electricity supply, and that the event was therefore within her jurisdiction.

On the substantive point, therefore, the Supreme Court's decision endorses the responsibility of suppliers to ensure that power supplies are maintained, whether or not they directly control all stages of the supply of power.

The case also emphasises a 'hands off' approach to domestic tribunals, particularly tribunals established by contract (although here the tribunal also fulfilled requirements under members' licences), and the deference to tribunal expertise epitomised by the recent Court of Appeal decision in *Australian Football League v Carlton Football Club* (1998) 2 VR 546. The Court decided, first, that the Ombudsman had correctly interpreted s.4.2(g) and thus 'asked the right question'. This was, it said, the extent of its role. As 'answering the question' involved the Ombudsman's special expertise, it was not for the Court to determine the correctness of her answer (unless her approach had been shown to be 'so aberrant as to be irrational', which it was not).

## Privatised dispute resolution

The EIOV is a dispute handling, rather than regulatory or disciplinary, body and thus less likely to be considered to be exercising the sort of power requiring substantial judicial supervision. It is an accessible and inexpensive forum for handling consumer complaints. At the same time it is an optional avenue for the consumer, who can reject the Ombudsman's decision (although it is binding on member companies if the consumer accepts it). These aspects of the scheme would suggest that courts might prefer to minimise their involvement with the Ombudsman's decision making.

Companies entering the market to supply electricity (or gas) agree to participate in the Ombudsman scheme; participation is a condition of winning the right to operate. The *CitiPower* case also emphasises this contractual basis for the agreement to abide by the Ombudsman's decision.

We now have a range of privatised utilities; it is encouraging to see this independent complaints-handling scheme, and its industry expertise, supported in the interests of the consumer. The development of such 'private justice schemes' nonetheless raises longer-term accountability issues. Might accountability in fact require a more interventionist judiciary? How are consumers to be informed about the performance of specific companies, and the industry 'kept honest' — what forms of public reporting are employed? This will become a more pressing issue in the electricity industry with full 'contestability' in January 2001, when domestic and small business customers will be able to 'shop around' for an electricity supplier. And how accountable and independent are the Councils and Boards overseeing the various schemes? These and other issues will require consideration if industry dispute resolution schemes are to be seen as acceptable alternatives for consumers.

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### References

1. For a fuller discussion of these issues see Stuhmcke, Anita, 'Administrative Law and the Privatisation of Government Business Enterprises: A Case study of the Victorian Electricity Industry', (1997) 4 *A.J.Adm.Law* 185. Unlike the Banking Scheme, but like the Telecommunications Industry Ombudsman, licensee companies are obliged to join an ombudsman scheme, which may be a significant factor in the effectiveness of the scheme.
2. The scheme is outlined in C. Lowe, 'Electricity Industry Ombudsman of Victoria: The Current State', (1999) CRJ 6.
3. The blackout was in fact found to have been caused by lack of maintenance: Greiner, N., 'Propaganda, Prejudice and Protests — Privatisation Policy in the 1990s' in Collier and Pitkin (eds), *Corporatisation and Privatisation in Australia,* CCH, 1999, p.7.
4. EIOV Annual Report 1998. 'Complaints' are the more complex category of matters dealt with by the EIOV. The majority of the EIOV caseload does not fall into the complaint category, being minor inquiries about billing etc.
5. Supreme Court of Victoria, 5 August 1999; No 2049 of 1998.