SHOPPING CENTRE COUNCIL OF AUSTRALIA

ISSUES PAPER: ACCESS TO DISPUTE RESOLUTION SERVICES FOR EXEMPT CUSTOMERS (JUNE 2017)

EXECUTIVE SUMMARY

The Shopping Centre Council of Australia (SCCA) represents Australia's major owners, managers and developers of shopping centres. Our 25 members are listed at the end of this submission.

We welcome the opportunity to provide a submission on the Australian Energy Regulator's (AER) *Issues Paper: Access to dispute resolution services for exempt customers.* This submission raises various issues we believe that the AER needs to further consider in developing its position on the access to dispute resolution services – to help ensure this is done in a manner that ensures a fit-for-purpose and cost-effective approach, and appropriate for the issues and risks for customers.

We have made previous representations on the issue of 'access to Ombudsman schemes' for exempt customers, including on all of the recent reviews noted at section 4.1 (*Interaction with other relevant reviews and work programs*) of the Issues Paper; including the Victorian General Exemption Order review, Queensland Regulatory Impact Statement, and Australian Energy Market Commission (AEMC) regulatory review.

In addition, we have discussed this issue with the AER, as well as some members of the Australian and New Zealand Energy and Water Ombudsman Network (ANZEWON).

We welcome the AER's and ANZEWON's coordinated and harmonised approach to this review, compared with some of the ad-hoc approaches noted above.

We support customer protections, and their current legislative basis under the *National Energy Customer Framework* (NECF). Our members provide internal complaints and dispute resolution mechanisms (e.g. call help-lines) for customers to ensure that issues can be raised and seek to be addressed.

While we therefore do not oppose the inclusion of embedded networks in Ombudsman schemes 'in-principle', and we acknowledge the AER has noted some nuanced issues in the Paper, we do have a concern there seems to be an over-riding and default preference for a transition to Ombudsman schemes across the board – particularly when noting the *'Ombudsman schemes' principles underpinning jurisdiction expansion'* at section 2.3.1.

We respectfully submit that such a preference would be too simplistic, and overlook whether indeed a real issue exists, customer-characteristics, and also the relationship with existing dispute resolution mechanisms including the need to avoid 'forum shopping'; which we acknowledge that the AER has noted aspects of these issues in the Paper.

We have four broad concerns, and comments, in relation to the Paper for the AER's consideration (which are articulated further in our response to the AER's questions):

1. There is no compelling 'problem', evidence of structural failure, or case for Ombudsman schemes to be the preferred approach to enable fit-for-purpose, appropriate and cost-effective dispute resolution for exempt customers.
2. The difference between customers across embedded networks and their characteristics needs to be further considered, including residential and non-residential customers, 'vulnerable' customers, and the fact that some 'small' customers can be *very* large companies that have multiple energy contracts across multiple jurisdictions. The AER has noted the divergence between customer types, as did the AEMC in its regulatory review consultation paper.
3. The AER and ANZEWON should consider alternate approaches – in company with the energy-specific (e.g. NECF, AER) and general protections (e.g. *Competition and Consumer Act*), but also to avoid 'forum shopping' - including (but not limited to) existing mediation mechanisms and tenancy tribunals (which in our sector, are well-known, well-established and one-stop-shops).
4. Any transition to an Ombudsman scheme needs to be risk-based, and cost-effective, acknowledging that such costs are spread across the incidental nature of embedded networks, and a relatively small customer base.

   There is also a need to ensure the fee-model is appropriate (e.g. pay-for-service, post-funding), as well as the membership model, which we believe should not be based on an 'exempt-network' basis, but at a corporate entity basis or an industry group model (similar to how we understand Victorian Public Transport Ombudsman scheme works in relation to *BusVic*).

(4. cont.)

In addition, inclusion of embedded networks as members of Ombudsman schemes must be matched with appropriate representation at the highest levels of governance – such as the Board - to ensure that representatives come from broader groups than traditional energy (and water) companies and consumer groups.

We believe these issues should be part of the starting point of the AER's consideration of access to dispute resolution services, including given that the AER notes (noting the NERL) that exempt customers should not be denied protections 'as far as practicable'. In a similar respect, we also note and paraphrase the AEMC, from a previous submission of theirs to the COAG Energy Council, that *"customer protections are not costless".*

We are keen to work with the AER, and ANZEWON, to assist in the consideration of these issues and development of a fit-for-purpose, cost-effective and appropriate dispute resolution approach for different embedded networks and their customers. We are also keen, as noted above, to ensure any approach avoids forum shopping. As we have also discussed such matters with the National Retailers Association (NRA), a key national retail tenant group, we would also be pleased to engage with them as part of developing an appropriate solution for our sector.

OMBUDSMAN PRINCIPLES

We are pleased to comment on the Ombudsman principles.

Ombudsman Principles for Expansion

We note the *Principles* approved by ANZEWON to guide their considerations in expanding their jurisdictions. Notwithstanding our other comments above and this submission, we have the following comments on these principles.

In relation to the *'Role of energy Ombudsman'*, this principle is slightly incomplete insofar it does not recognise the fact that 'state-based tribunals' are often the main avenue to dispute resolution for certain sectors. In our case, this principle fails to recognise that unlike traditional energy companies, whose principal relationship with a customer is limited to the supply of energy, in our sector our principal relationship with a customer is a lessor-lessee relationship, and the supply of energy is therefore incidental, along with other services.

Further, statements such as those at section 3.4 (page 18) - *"our preliminary observation is that customers often do not know what external avenues are available to them when they have a complaint"* – do not ring true for our sector.

Dispute resolution mechanisms in our sector are well-established, well-known and the subject of ongoing review. If anything, as articulated in various 'Small Business Commissioner' reports, there is a very healthy uptake of these mechanisms which in most cases result in a tenant being advised that their inquiry or complaint has no basis in terms of a breach or formal dispute, for which they are then provided advice or referred to published information or guidance material.

As such, we don't agree with the AER's note that relatively low numbers of complaints could mask, or hide, a broader issue.

We also believe that this principle does not appropriately address the issue of 'forum-shopping', or that in the case of shopping centres, some disputes include a variety of issues, so the role of single, unintegrated 'energy' dispute resolution scheme could be limited in terms of our overall engagement with customers/retailers.

In terms of '*Membership*', we believe that this needs to be further considered in terms of how membership would be applied to exempt embedded networks. We don't support an 'asset' based membership, as this could lead to significant cost and compliance issues. We believe, if the option of Ombudsman schemes is further progressed, a 'corporate entity' membership model should be investigated, or models similar to the PTO whereby membership could be via industry groups such as ourselves, on behalf of our members and sector.

We also support that it is noted that there is a specific principle noting participation in Ombudsman schemes via representation on governance bodies. At this stage, the make-up of Ombudsman scheme Boards is made up of traditional energy and water providers and consumer groups.

It would be inherently unfair, and against good governance, if the new sector of embedded networks were introduced to Ombudsman schemes but did not have an enshrined role at the highest levels of governance such as the Board. It is our ongoing experience that there can be a fairly simplistic view of sectors like ours, including how the retail market operates, and how retail tenancy legislation operates, including its interaction with other legislation, works.

In terms of the *'Fee-structure'*, we note that there may need to be variation in the traditional fee structure. There needs, however, to be more analysis of this issue, including how any fee-structure applies to embedded networks which are ultimately incidental businesses – as recognised under the two-tiered regulatory framework.

We are keen to ensure that there is an awareness that any costs will be spread across a relatively small customer base, whereby costs cannot be spread across a broad base as in the case of authorised energy retailers.

ISSUES FOR CONSIDERATION

We are pleased to respond to the AER's formal issues for consideration and questions:

WHAT SHOULD BE OUR APPROACH TO CONSIDERING EXEMPT CUSTOMER ACCESS TO OMBUDSMAN SCHEMES?

Q1. Do you agree with our approach to external dispute resolution? What are the barriers to pursuing this approach and how might these be overcome?

Q2. Noting the different approaches to dispute resolution in the Retail and Network Guidelines, what considerations should we be aware of if we align the two Guidelines?

Q3. Are there any issues specific to small scale operators to which we should have regard?

Q4. Are there any other considerations we should balance when forming a position on this issue?

We don't entirely agree with the AER's approach, to the extent that there could be a pre-determined view or outcome that Ombudsman schemes are superior or most-appropriate to provide fit-for-purpose and cost-effective customer protections.

As noted previously in this submission, we outlined four key broad issues we believe need to be considered in terms of the AER's approach.

Other issues need to be considered, some of which the AER has acknowledged, in forming a balanced position.

A key issue is the nature of the relationship between an embedded network owner and their customers. In our sector, the principal relationship between the embedded network operator and customer is that of a retail leasing arrangement – in most cases a highly regulated leasing arrangement under retail tenancy legislation (which can also draw down aspects of the *Competition and Consumer Act 2010*) which also prescribes relevant mediation and dispute resolution mechanisms, such as Small Business Commissioners, and tenancy tribunals.

These mechanisms are well-established and well-known in our sector.

In this regard, we believe the introduction of an Ombudsman scheme could in fact introduce a 'different' approach and lead to confusion and forum-shopping.

The long-term, structured nature of this relationship, which can range from 5-year to 25-year lease terms (which can include lease renewal options), highlights the long-term nature of the lessor-lessee relationship and that an embedded network operator has an interest to identify and resolve issues with their customers.

A further issue to consider is that the operation of embedded networks, and on-selling of energy, in shopping centres:

1. is incidental (compared with their core business of shopping centre operation – similar to the case of other embedded network operators), and
2. is to a relatively small market (~65,000 customers, at a maximum, nationally), and within a defined set of customers, and

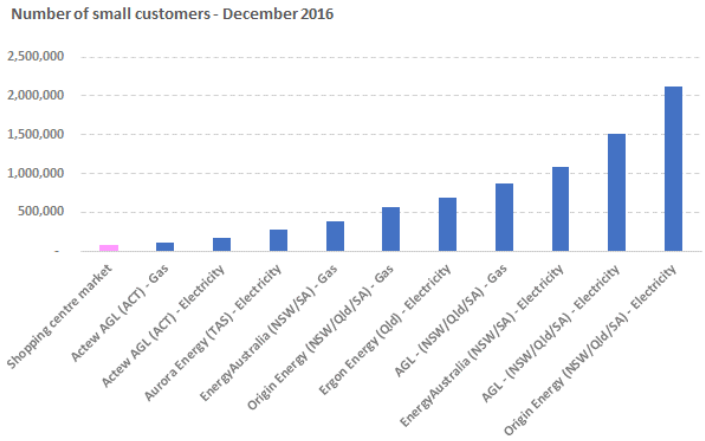
The size of the 'shopping centre embedded network market' is illustrated below, from an industry statistics report (prepared by Urbis) which is publicly available on our website:

Table 2 - Number of Specialty Shops, 2014

Centre Type	NSW	VIC	QLD	SA	WA	TAS	NT	ACT	Total Australia (no.)	Total Australia (%)
Regional	5,956	3,340	3,388	803	1,173	0	0	809	15,469	24%
Sub Regional	5,174	4,707	4,744	1,397	2,397	218	204	103	18,943	29%
Neighbourhood	5,754	3,276	5,033	1,604	3,373	223	266	287	19,815	30%
CBD	1,604	920	605	508	414	114	16	18	4,199	6%
Outlet	258	758	453	120	102	0	0	93	1,784	3%
Other	860	1,903	1,357	194	573	9	50	26	4,972	8%
Total Shopping Centres	**19,606**	**14,904**	**15,580**	**4,626**	**8,032**	**563**	**536**	**1,336**	**65,183**	**100%**
(%) of Australia	**30%**	**23%**	**24%**	**7%**	**12%**	**1%**	**1%**	**2%**	**100%**	

Source: Shopping Centre Industry Statistics – August 2015: Urbis – available at scca.org.au

The overall embedded network 'market' across shopping centres is, clearly, relatively small particularly when compared with the broader energy market covered by authorised energy retailers and registered network service providers. The AER's *Small Customer Time Series* (as at December 2016) provides a reference for this relative difference. For instance, Origin Energy has over 2 million small electricity customers (NSW, Queensland, South Australia), and AGL has over 1.5 million customers (NSW, Queensland, South Australia). This compares with 39,800 shopping centre tenants across NSW, Queensland and South Australia (1.14% of Origin and AGL electricity customers in those jurisdictions). This relative difference is illustrated in the chart below:



We also believe the AER should take a risk-based approach, which possibly prioritises higher-risk customers, such as vulnerable customers and operators. As we have noted, there is a difference between residential and non-residential customers. In some cases, small customers can be very large companies that also have multiple energy contracts across multiple jurisdictions. The business nature of the relationship in shopping centres, and the customer's capacity to have issues addressed with their lessor, should be taken into consideration.

WHAT IS THE SCALE OF THE PROBLEM?

Q5. How many energy disputes do exempt entities encounter per year?

Q6. What measures can assist in quantifying the scale of energy disputes concerning exempt customers? What weight should be place on being able to quantify the scale of the issue?

We don't believe there is a significant 'problem' in terms of disputes in our sector.

Before progressing to an Ombudsman scheme – and its potential unnecessary additional complexity and cost – there needs to be an appreciation of the issue (if at all) and how they're currently resolved.

In our experience, energy-related complaints are relatively low, and when complaints do arise, they are not generally 'disputes' per se. As noted previously, our members have internal complaints and dispute resolution mechanisms.

The main area of complaints from shopping centres that we've been advised on relates to meter-reading, billing, and double-billing. In each of these cases, the 'issue' is generally resolved internally including through the provision of further advice and information; or simple resolution (e.g. if there is a metering issue).

In a recent discussion with one of our members in preparing this submission, we were shown examples from their call/help-line across a recent one-month period across their embedded network customers in NSW and Victoria.

Of the total logged calls:

- None related to legal/regulatory issues,
- None related to complaints.

Of the customers making contact with the call/help-line, we were advised that around 80% of calls related to bill payments, most of which related to customers receiving an invoice or reminder notice, but calling to clarify that their payment had been registered, where in most cases, the payment had been made in the past 24-hour after the invoice has been issued.

Another category of calls we were advised on related to customers advising they do not want to pay a bill because they had a broader issue with the landlord in relation to their leasing and tenancy arrangements – in other words, issues unrelated to the provision or sale of energy.

In our environment, and others, where the principal relationship is via a leasing relationship, we believe it can be difficult to de-couple energy (or in the above case, a perceived energy issue) from other issues. This is the ongoing nature of retail leasing, for which major leasing complaints and disputes can include issues in relation to security bonds, repairs and maintenance, outgoings, lease termination, pre-lease negotiations and rent.

As we have stated clearly in other submissions, including to the AER (in our submission on the last Draft Network Exemption Guideline), the issue of double-billing has also been an issue in embedded networks, but the issue is created whereby some authorised energy retailers incorrectly issue a network charge to an on-market customer. We have raised the need for this to be addressed in other submissions, as the embedded network operator has no powers to resolve this issue; but seems to be expected to deal with the issue. In this regard, in the absence of being provided with appropriate powers, or retailers having an obligation to address this issue, we hope and anticipate that the AEMC's Embedded Network Rule Change, which commences on 1 December 2017, could help address this issue via the new Embedded Network Manager role.

WHAT IS THE NATURE OF ENERGY DISPUTES EXPERIENCED BY EXEMPT CUSTOMERS?

Q7. Do you agree with our characterisation of energy disputes experienced by exempt customers? Is bundling of complaints with other issues common?

Q8. Is it possible to isolate and resolve energy-specific disputes where there are a number of issues raised by exempt customers?

Similar to what is noted in the Issues Paper, as noted above, billing can be a common complaint in shopping centres. Other complaints can relate to a customer's energy use and tariffs, which is generally resolved via the provision of information. This can include a customer not realising that their own energy use has increased, which can include (for instance) not turning off equipment while their shop tenancy is closed outside of trading hours.

As noted above, in our operating environment with retailers/customers, where the principal relationship is via a leasing relationship, we believe it can be difficult to isolate and de-couple energy from other issues.

This is the ongoing nature of retail leasing, for which major leasing complaints and disputes can relate to security bonds, repairs and maintenance, outgoings, lease termination, pre-lease negotiations and rent. If there is an approach to isolate energy-specific disputes, via formal means, there is a strong need to avoid forum-shopping.

CAN EXISTING EXTERNAL DISPUTE RESOLUTION MECHANISMS EFFECTIVELY DEAL WITH ENERGY DISPUTES?

Q9. What other external dispute mechanisms exist to resolve energy disputes? Do they effectively deal with energy disputes?

Q10. How many energy disputes encountered by exempt entities are escalated beyond internal dispute resolution processes?

Q11. Do exempt customers have a clear understanding of the external avenues to resolve energy disputes? What are exempt customers' experiences of using these avenues?

We maintain that 'internal' dispute resolution is the best-approach, whereby there is an incentive for embedded network operators and their customers to resolve an issue at the embedded network level. As noted, our members have clearly identified call/help-lines on their customer bills, which both promotes and provides transparency to customers their immediate avenue to raise issues. Our members do not 'hide' from their customers in being able to raise a complaint. In any case, in our sector, retailers can always contact shopping centre management, for which they frequently do.

In relation to external mechanisms, as noted previously, our sector has well-known and well-established dispute resolution mechanism under retail tenancy legislation. As broadly referenced by the AER, these can be considered to be an 'effective one-stop-shop'.

Specifically, this includes the provision of low-cost mediation services by various Small Business Commissioners – some of whom provide detailed annual reports on the nature of the issues raised under relevant legislation - through to tenancy tribunals (e.g. NCAT, VCAT, SACAT). Some tribunals have significant financial jurisdiction (e.g. NSW 'NCAT' dispute thresholds increased from $450,000 to $700,000 from 1 July 2017), and rectification and order powers.

ADDITIONAL CONSIDERATIONS

Q12. Do stakeholders have comments on these additional considerations?

Q13. What other issues should be considered?

In relation to the AEMC's Embedded Network Rule Change, as noted above we believe that this should help address some current 'double-billing' issues. The rule change also aims to facilitate increased competition, which, as the AEMC notes in a submission to the COAG Energy Council, *"for most products and services, robust competition is the best form of consumer protection"*.

As noted above, we believe that any consideration of inclusion into Ombudsman schemes should include a different approach to how membership could be applied and function, such as that used in the PTO whereby an industry association is the member on behalf of various industry participants.

It is critical that the AER and ANZEWON considers the issue of 'forum-shopping'. We have too often been involved in other policy and regulatory issues and raised issues such as forum-shopping, and it can unfortunately be left in the hands of our industry to deal with such uncertainty. We find this approach unacceptable. In short, there should be no avenue for forum-shopping. This may require a strong alignment between any potential policy and regulatory change by the AER and ANZEWON members, and the regulatory basis for other dispute resolution mechanisms such as Small Business Commissioner mediation services and tenancy tribunals.

As an example, the functions of these mechanisms may need to be amended to expressly rule-out the consideration of energy-related issues under an exempt seller and customer arrangement.

We have one additional issues we believe need to be considered by the AER:

DIFFERENT NATURE OF CUSTOMERS

We reiterate our view that the AER needs to consider the difference between embedded network customers, and how these differ across embedded networks.

The AER has noted this in general terms, such as the difference between residential and small business customers (the AEMC even noted the difference between 'vulnerable' and 'affluent' customers), however we believe this needs to be further interrogated.

We highlight this issue, as much of the feedback from consumer groups we've observed in other forums (e.g. SACOSS) relates to: (1) residential circumstances (e.g. permanent caravan parks and residential parks), and (2) vulnerable and low-income customers.

It's worth noting that, a key tenant and customer group in our sector, the National Retail Association (NRA), which is a member of the AER's *Customer Consultative Group*, does not appear to have raised similar issues or concerns.

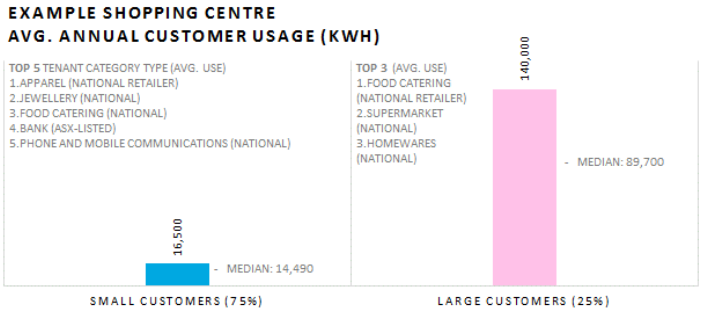
As noted above, 'small customers' in our members' centres can also be *very* large companies, including national retailers and ASX-listed companies. Being a small customer is certainly not a proxy for being small, or vulnerable.

As an example, a 'small' customer in a shopping centre – as defined by their single store energy use – can be owned by a large, multi-national business, which is also not defined as a 'small business' for other government policy purposes, such as having a turnover of less than $10 million (for corporate tax purposes - ATO), or multi-year contract values of less than $1 million (for unfair contract terms under the *Competition and Consumer Act 2010* - ACCC).

To cite a specific example, a large national retailer, operating in Australia and overseas across 17 countries, and with a total of over 1,000 stores, can be deemed as a 'small' energy customer in each of their stores. However, given their scale of operations, they are clearly not a 'small business' – or akin to a small residential customer - requiring the same level of regulatory protections as a genuine small business that lacks the size and sophistication of a large chain, with multiple electricity contracts in multiple jurisdictions.

The following chart outlines an example shopping centre (Victoria – applying the 40MWh small/large customer threshold), and highlights the average usage for the centre's small customers (75% of total tenants) and large customers (25% of total tenants).

Also noted is the top respective 'customers' based on tenant categories (based on the *SCCA Sales Reporting Guidelines* – available on our website at www.scca.org.au), and type of company.

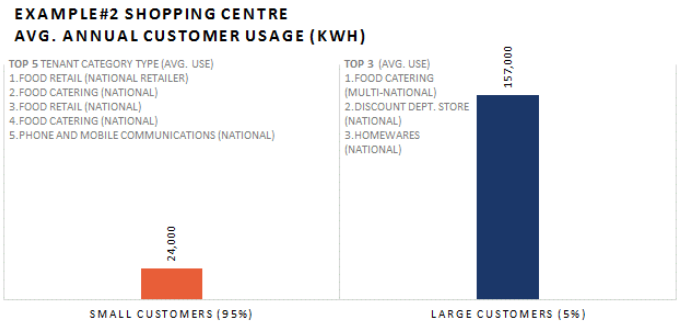


Using the above retailer/tenant categories, applying available industry benchmarks (Urbis) highlights that the average occupancy cost, in a comparative centre, is as follows:

TENANT TYPE	TOTAL ANNUAL OCCUPANCY COST (AVG.)	ESTIMATED ANNUAL STORE TURNOVER (AVG.)
APPAREL	$ 236,291	$ 1,100,000
JEWELLERY	$ 222,054	$ 1,700,000
FOOD CATERING	$ 159,655	$ 900,000
PHONE AND MOBILE COMMUNICATIONS	$ 163,319	$ 1,200,000
HOMEWARES	$ 207,519	$ 1,700,000
AVERAGE	$ 197,768	$ 1,320,000

This highlights that for the above retailers, the overall occupancy cost, per store, is reasonably high, with an average occupancy cost of $197,000, and an average turnover of $1.3 million.

Similar to the above example, the following chart outlines an example Queensland shopping centre (applying the 100MWh small/large customer threshold), and highlights the average usage for the centre's small customers (95% of total tenants) and large customers (5% of total tenants), and also the top usage based on tenant categories.



Like the Victorian example, the largest users in the 'small customer' categories include food retail (e.g. bakery) and food catering (e.g. café/restaurant) and comprise large national retailer groups.

These retailer groups, with national (and multi-national) operations cannot be considered to be small, or as having the same risks as small residential customers that are potentially low-income, disadvantaged and vulnerable.

The Productivity Commission noted in their report into the *Relative Costs of Doing Business in Australia: Retail Trade* (2014) – in relation to a (shop) retailer's occupancy costs within shopping centres, including electricity costs - that *"The overall impact of these occupancy cost increases on individual retailers would differ according to such factors as their cost structure, the length of lease and bargaining power"* (Productivity Commission, 2014).

Further, according to the Commission – citing figures from ISISWorld – *"energy and utility costs comprise less than 5 per cent of the cost of doing business for the vast majority of retail subdivisions. They are more significant costs for liquor retailers, supermarkets, hardware stores and grocery stores, comprising between 5-10 per cent of operating costs"*.

As noted in our analysis above, this highlights that energy costs, as a cost of doing business, vary across different types of retailer.

SHOPPING CENTRE COUNCIL OF AUSTRALIA

ABOUT US

The SCCA represents Australia's major shopping centre owners, managers and developers. Our members are as follows:

CONTACT

Angus Nardi
Executive Director
Phone: 02 9033 1930
Email: anardi@scca.org.au

Kristin Pryce
Deputy Director
Phone: 02 9033 1941
Email: kpryce@scca.org.au