

 	<p>John Curtin Institute of Public Policy</p> <p><i>The ACCC at work: consumers, competition & regulatory issues</i></p> <p>Rod Sims, Chairman</p> <p>13 September 2012, Perth</p>
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Thank you for the invitation to speak with you this morning. It is a pleasure to be in Western Australia again and to participate in the important forum the John Curtin Institute provides for discussion of public policy Issues.

There is much I could cover today. The Australian Competition and Consumer Commission (ACCC) is responsible for competition and consumer regulation, and for the regulation of particular infrastructure sectors.

Our role in competition covers enforcement, merger assessment and authorisations.

Our enforcement efforts are aimed at ensuring there are no breaches of our Act¹ particularly in relation to cartel conduct, agreements that lessen competition and the misuse of market power.

For example, last month we announced Federal Court proceedings against two businesses alleging that they engaged in anti-competitive conduct, including cartel conduct, in selling liquefied petroleum gas in the Sydney Metropolitan area.

Our role in mergers sees us dealing with some 300 transactions a year, most of which are quickly approved, but a few complicated cases attract considerable media attention. The current transaction attracting such attention is the Seven Group's proposed acquisition of Consolidated Media Holdings. Today we have announced that we are releasing a Statement of Issues in which we express our preliminary competition concerns given that the transaction would see the Seven Group having a substantial interest not only in Channel Seven but also in Fox Sports Australia. Our concerns arise in the free to air television market given the influence Channel Seven may be able to exert over Fox Sports Australia in joint bids for sports rights.

And of course our main current authorisation activity is to assess the potential arrangement between Qantas and Emirates.

Last Friday, Qantas and Emirates applied for authorisation from the ACCC to integrate and co-ordinate their international networks. This will involve Qantas operating its European services via Dubai rather than via Singapore so that it can integrate into the Emirates network. But the arrangement will also have implications for trans-Tasman routes and will involve the parties code sharing globally including in Asia. They are seeking interim authorisation from the ACCC to plan and negotiate the details of the arrangement with a view to commencing, if approved, in April 2013.

The authorisation process is a very public process in which the ACCC seeks submissions on the likely public benefits and likely anticompetitive detriments

¹ *Competition and Consumer Act 2010*

resulting from the arrangements. Submissions are due by 1 October on the application (and on 21 September on the interim). All public submissions will be available from our website. At this stage the ACCC plans to issue a draft decision in December before making a final decision in the first quarter of 2013. There is a six month statutory timeframe for the assessment of authorisation applications, and large transactions like this one typically take the full six months.

The ACCC can grant authorisation if the likely benefits to the public outweigh the likely anticompetitive detriments. When we apply this test it is important to bear in mind that the ACCC's focus is on the benefits that the arrangement delivers to the public generally rather than the benefits to the parties. Of course Qantas believes it will benefit from the arrangement, that is why Qantas wants to enter into the deal, but our question is a broader question about how this will affect the public more generally, particularly the travelling public. For example, we will look at both how the arrangement could benefit consumers by providing greater choices across the combined network, but we will also look at whether the arrangement could reduce competition and so raise prices on particular routes.

Our role in relation to consumer regulation involves essentially misrepresentations and other issues under the Australian Consumer Law, and product safety issues.

Our main current consumer protection case involves Google. We recently appealed to the Full Federal Court which concluded that Google had created misleading messages through its technology in response to users search queries. The High Court of Australia has since granted special leave to Google to appeal this decision and a hearing occurred this week, where judgment was reserved.

Today I want to focus on our third area of responsibility which deals with infrastructure regulation and which covers equally topical issues. It is clearly best to have competition wherever possible but where you have, for example, monopoly infrastructure, regulation will often be needed to protect businesses and consumers who rely on the services it provides.

The ACCC's roles in infrastructure regulation are complementary to those in competition and consumer law. The regulatory role means the ACCC has continuing contact with a regulated industry. This assists us to better understand the issues that may arise in a competition matter in that industry.

Today I want to draw out some of the desired features of regulatory arrangements and apply them to particular matters we have currently under consideration.

Specifically I will deal with the following:

- It is desirable to introduce incentives into regulation wherever possible and today I will discuss our desire to do this in relation to the regulatory arrangements for the NBN (national broadband network).
- The role of infrastructure users and consumers is extremely important in regulatory decision making and today I will illustrate this by again discussing the regulation of the NBN, our role in regulating wheat ports, and the Australian Energy Regulator's role in regulating energy networks.
- Efficient infrastructure often needs effective demand management and I will discuss this issue in relation to electricity networks and urban transport.
- Finally I will discuss the timeliness of decision making in terms of Part IIIA of the *Competition & Consumer Act 2010* covering network access regulation.

1. Introducing Incentives – the example of regulating the NBN

Implementing the regulatory arrangements for access to the NBN has been a major focus for the ACCC over the past 12 months. The right access settings are crucial to ensuring that the potential pitfalls of having a monopoly— high prices, inefficient investment and poor service quality — are minimised. They are also vital for facilitating robust competition in the retail telecommunications sector. This competition may involve not just Telstra and Optus, and newer ISP's such as iiNet and TPG, but potentially new players from outside the sector.

NBN Co submitted a Special Access Undertaking (SAU) late last year which was subject to considerable consultation with users. It became clear from those consultations, and the ACCC's own assessment, that the undertaking required significant re-structuring. As NBN Co itself acknowledged, responses focused on the nature and extent of ACCC oversight over the 30 year term of the SAU, and the level of certainty provided to retailers as compared to the level of flexibility provided to NBN Co. Accordingly, NBN Co has this week withdrawn this undertaking.

However, recognising the significance of the feedback provided by NBN Co's customers and the ACCC, in June NBN Co gave the ACCC an outline - available on the ACCC's website - of a revised SAU,. We expect this revised SAU to be formally lodged in the coming weeks.

NBN Co has noted that the revised SAU will commit to maintaining the affordability of prices, with the prices of key products being locked in for five years and the inclusion of price controls over all of its products. We would hope that the revised SAU strikes a better balance between providing certainty over NBN Co's long term cost recovery arrangements and flexibility for other access terms to evolve over time.

A key challenge with the regulatory arrangements for the NBN will be in creating strong incentives for NBN Co to continue to meet customers strongly increasing data needs, at a reasonable cost. So how might we do that?

Usually the way regulation applies is to allow a regulated rate of return on the approved asset base and to set prices accordingly. In this way regulated monopolies can be largely guaranteed their rate of return irrespective of how they perform. A key difference between the NBN and other established monopolies regulated by the ACCC is that NBN Co will incur significant costs up front to build the network, and customers are only progressively acquired as the rollout is undertaken. It follows that, in the early days of the NBN, applying a rate of return on capital would lead to excessive prices. In response, NBN Co has proposed to fix some prices broadly at what consumers are paying today for broadband services.

A key question we will need to consider is how many prices need to be fixed, and for how long. It is possible to imagine that if the key prices are fixed for sufficiently long then the only way NBN Co will make its regulated rate of return is if it builds capacity to provide higher speeds and people continue to demand more data. That is, if NBN Co charges broadband users similar prices to what they pay today for what they are getting today, it will only earn enough revenue to recover its costs if the much higher demand for data that the NBN is being built to supply eventuates.

It will be interesting to see how this plays out. What is clear however is that discussion of the regulatory arrangements for the NBN are likely to focus heavily upon the incentives they create for NBN Co to behave in ways which lead to positive outcomes for consumers.

2. The role of infrastructure users and consumers in settling regulatory arrangements.

I have just said that the NBN will be lodging a new SAU soon. This will trigger discussion with users and their effective input will be essential to achieving an appropriate structural undertaking.

There are two other areas where user input will be essential that I would like to touch on.

Wheat Ports

The ACCC currently has a specific role in regulating wheat ports. The Government identified access to wheat ports as an important consideration in the dismantling of the AWB's single desk arrangements. In moving from a monopoly to competition in the export and marketing of Australian bulk wheat, the Government was concerned that port operators could assume positions of power and themselves dominate wheat export marketing in their regions, using their ownership of bottleneck infrastructure.

The government addressed this concern by requiring the operators of port facilities, who also exported wheat, to provide access undertakings to the ACCC under Part IIIA of the Competition and Consumer Act.

These undertakings provide the terms and conditions, other than price, on which the vertically integrated port operators provide access to their wheat exporting competitors. The reforms resulted in over 20 traders entering the market for export wheat, which means more competition for the produce of Australia's wheat farmers.

The Wheat Export Marketing Amendment Bill 2012 currently before the Australian Parliament would remove the requirement for access undertakings. The Bill provides that access undertakings will not be required by 2014 if the industry can develop an acceptable voluntary code of conduct to govern these access issues.

In order to be approved by the Minister for Agriculture, Fisheries and Forestry, however, the voluntary code would need to include the key elements of existing undertakings and, most important, will need to meet the needs of those exporters that need access to the bottleneck facilities.

The key point is that the government has recognised that alternate arrangements to those applying now will only work if they satisfy the needs of the exporters who need access to the bottleneck infrastructure. This is a very important step in infrastructure regulation decision making.

Electricity Networks

When we turn to the regulation of electricity networks we find a different story. With the NBN and wheat ports we have large users who can make their views known. Government and regulators need to allow them the opportunity to provide input, and this is crucial, but once the opportunity is provided their input can be easily made.

It is a different story when most users are quite small and indeed mainly consist of households. How do we get their voices heard? This has been a key area of concern in recent years for the ACCC, the Australian Energy Regulator (AER) and other state based regulators.

Traditionally when regulating energy networks the AER only gets effective input from the companies that own the monopoly infrastructure, and are seeking higher prices, and from some well organised large users. This leaves the important voices of the smaller users, especially households, unheard.

There are two important changes needed.

First, rather than have the electricity network company put in their proposals to the regulator largely unseen, they should be required, in the first instance, to put and consult on proposals to the public, hopefully with options on different levels of spend, prices and reliability outcomes.

The draft rules that cover electricity network regulation recently released by the Australian Energy Market Commission will facilitate such a step.

Second, there needs to be a well funded consumer body with appropriate expertise that can engage in each step of the regulatory process to ensure that the voices of small users are heard.

These changes have the potential to greatly improve regulatory outcomes. When regulators are reaching their conclusions on network pricing it is crucial that they have input not just from those seeking higher prices, but from all the affected parties, so that decisions are well balanced.

3. The importance of demand management

Infrastructure networks, be they electricity poles and wires or roads, need to be built to cater for peak demand. We often see low usage, for example, on most roads at midnight.

The peakier the demand the higher the cost of providing the infrastructure and the more users will pay for it.

In the electricity sector, although demand is falling, peak use has been steadily rising which drives the need for more network investment. There are no easy solutions but there are some debates that need to be resolved.

The first is how much we rely on market solutions given by pricing signals and how much we rely on other measures. Market based solutions require consumers to respond to pricing signals and shift their demand to reduce pressures at peak times or to adopt alternatives such as small scale generation. This would require the adoption of smart meters and retail peak pricing. It requires retailers to offer contracts that expose customers to price signals. Another approach is to have more direct control, such as load management, to assist consumers to reduce load at peak times.

A second issue is the role of regulated monopolies in driving innovation in demand management. While the network businesses currently do not have an incentive to address this issue, they do control much of the critical infrastructure and information required to implement any solution. The difficult issue is to decide whether network business should begin to provide demand management services to customers in competition with retailers or other third party service providers in contestable markets.

The issue of demand management is also vital when we turn our attention to urban transport. Most governments have ruled out the need for demand management to reduce the ever rising costs of urban traffic congestion. I believe, however, that the issue of congestion charging, while contentious, needs to be addressed. While congestion charging is contentious so increasingly is the issue of increasing traffic gridlock.

Not only would congestion charging smooth out the peaks of road use it could also help us address the issue of how we pay for urban transport infrastructure in the future. The losses incurred on public transport are now so large that some state Treasuries are resistant to expanding the public transport network. Some combination of appropriate congestion charging on roads, careful use of the revenue raised, and increased efficiency is needed to address Australia's growing urban transport problems.

4. Addressing the timeliness of regulatory decision making – Part IIIA network access regulation

In the early 1990's the only way to deal with infrastructure and competition in downstream markets was under Section 46 involving the misuse of market power. Section 46, however, had limited application to state owned enterprises and wasn't the best avenue for establishing access to essential infrastructure.

In responding to this, the Hilmer review recommended what has now become the Part IIIA access regime under the Competition and Consumer Act.

In many instances Part IIIA has facilitated competitive outcomes. There have been around 25 declaration applications made since 1995, many of which have concluded with the parties reaching a commercial agreement. The good news is that the ACCC has only once had to arbitrate and make a determination on an access dispute under these provisions.

The declaration process under Part IIIA has, however, been associated with very lengthy and expensive review processes. Some matters stretched over several years. Such delays create uncertainty and increased costs for the parties involved, and at a broader level they undermine the credibility and effectiveness of the national access regime.

One case, the application for declaration of rail lines in the Pilbara, has been running for about 7 years. The High Court is due to make a ruling on this case tomorrow which should resolve some of the uncertainty that has developed in the declaration criteria. In particular, the decision should clarify what it means for a service to be "Uneconomical for anyone to develop another facility".

Also later this year the Productivity Commission will commence a review into the national access regime. One line of inquiry will be whether the legal and administrative procedures in Part IIIA are as effective as they could be. I take the view that there is significant scope for streamlining.

Conclusion

The ACCC and the AER have a very rich agenda of issues that we are dealing with. Two such issues are how the ACCC regulates the NBN and how the AER regulates energy networks. In both cases there will be issues raised of wide application which are important to all Australians.

Thank you for your time today.