

  <p data-bbox="638 336 813 448">Australian Competition &amp; Consumer Commission</p>	<p data-bbox="893 235 1460 403"><b>Stocktaking recent competition policy developments in SE Asia Public Conference</b></p> <p data-bbox="925 448 1460 526"><b><i>Australia's competition law in practice</i></b></p> <p data-bbox="1197 571 1460 660"><b>Ed Willett Commissioner</b></p> <p data-bbox="1037 705 1460 795"><b>11 January 2010 Manila, The Philippines</b></p>
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## **Introduction**

Throughout the world, with few exceptions, developing, newly developed and developed economies are applying renewed vigour to the age-old economic policy question of the role of governments in, and regulation of, markets in meeting community needs. Confidence in unfettered markets has been shaken by a range of events over the last decade, beginning perhaps with the Asian Financial Crisis of the late 1990s and of course, most recently, the Global Financial Crisis.

Unsophisticated rhetoric on the perils of all government intervention and regulation has little contribution to offer in this debate, if it ever did.

But we should not forget the wealth that free enterprise and competitive markets have delivered to those countries prepared to embrace them. Nor should we forget that government efforts to allocate community resources to particular endeavours have often performed poorly.

Despite recent market upheavals on a global level, a longstanding and widely accepted economic principle endures: that in the absence of well recognised market failure, open competitive markets and informed consumer choice are the best means to allocate and use community resources to advance the interests and objectives of those communities.

The challenge is to identify relevant market failures and the most effective way of ameliorating their adverse impacts, recognising that sometimes the most effective way to deal with relatively minor market failures is to leave them be.

Even then, businesses need to be confident that the policies, rules and rule enforcement that apply today will continue to apply in the future, without the

risk that inconsistent regulation or future political decisions will undermine today's investments and entrepreneurial effort.

All this goes to underpin some broad principles that should apply to economic regulation in any political system to ensure that markets best meet the needs of the community. Thus economic regulation should:

- provide clear market rules focused on ensuring that markets deliver efficient and fair outcomes for consumers and the national community;
- aim to eliminate market manipulation by dominant firms or conspiracies, and fraudulent, misleading, and improperly motivated behaviour (such as vested interest) that is contrary to the interests of consumers and the national community;
- establish an independent regulatory and enforcement agency with adequate expertise and resources, free from corrupt or political influence in its operations; and
- otherwise ensure that property rights and business interests and activities are respected and protected.

Economic policies and regulation cover a broad field and includes topical aspects such as monetary policy, companies and securities regulation and prudential regulation.

However, this presentation is confined to competition policy and competition regulation. In particular, it will outline Australia's experience with the development and implementation of comprehensive competition policies over the last fifteen years; and how these policies have addressed the principles for economic regulation outlined above. The presentation will provide:

- an overview of Australia's National Competition Policy framework;
- a summary of the current competition policy legislative and institutional arrangements;
- some topical competition policy reform issues and agendas;
- a few case studies on the application of competition policy reform to particular industries or aspects of regulation; and
- a final section on capacity building and some cooperative activities that the ACCC has been involved in throughout the region.

## **1. Australia's National Competition Policy framework**

During the 1990s, Australia embarked on an ambitious micro-economic reform program. It followed some less ambitious market liberalising measures in the 1980s, including in the finance sector and in import tariff reforms. Given that traded products sectors were being exposed to more competition, the perceived need of the 1990s reforms was to improve the performance of the non-trade sectors.

This reform program was developed in response to concerns about Australia's economic performance compared with some other developed countries. The

first step was an extensive public review (the National Competition Policy Review – NCPR – and otherwise known as the “Hilmer” review).

Consequently, Australian governments recognised that competition policy was much broader than legislation governing market conduct. Rather, competition policy encompasses all policy dealing with the extent and nature of competition in the economy.

In 1995, Australia’s National Competition Policy (NCP) reform package was established by three intergovernmental agreements, including the Competition Principles Agreement, signed by the federal government and the governments of Australia’s states and territories. The package of reforms largely reflected the recommendations of the NCPR recommendations, and comprised three groups of reforms:

- First, the creation of a single, economy wide competition law applying to all markets and businesses; together with the comprehensive review and appropriate reform of all other federal, state and territory legislation that regulated markets and restricted competition. The underpinning principle of these reforms was that where there was a net public benefit case for exempting the national competition law or restricting competition, this should be achieved using the specific exemption processes under the national law.
- Second, a set of policies designed to improve the performance of publicly-owned businesses, and in particular, to ensure that these businesses were subject to the same competition policy disciplines as private firms. Specifically, these policies included:
  - measures to ensure that publicly-owned companies did not enjoy any particular advantages by virtue of being part of government when competing with private firms. These measures included a competitive neutrality complaints process;
  - the structural reform of public monopolies, where the benefits of separating parts of these enterprises that did, or viably could, operate in competitive markets outweighed any associated costs; and
  - independent pricing oversight to limit monopoly pricing or behaviour of any remaining public monopolies.
- Third, a new legislative regime in Part IIIA of the Trade Practices Act to promote competition in markets that needed access to bottleneck infrastructure (such as electricity and communications wires, gas pipelines, railways and airports). Part IIIA is intended to provide an umbrella regime for access regulation at all levels of government. The reserve mechanism under Part IIIA, which was intended to minimise regulatory intervention, is a two-part process. A test is applied on a case-by-case basis for determining whether nationally significant monopoly infrastructure services should be regulated (otherwise known as a declaration). Even then, regulation might still not be required

The NCP was a mix of regulatory and market liberalising measures applied uniformly throughout the Australian economy, large businesses and small, companies, partnerships, other business entities and individuals, and privately and publicly-owned companies alike. The focus was upon the economy wide application of pro-competitive regulation, the removal of structural and legislative impediments to promote more efficient and competitive markets, improve the performance and competitiveness of government-owned businesses and address entrenched monopoly problems in the economy, especially those involving bottleneck infrastructure.

### ***A single economy wide competition law***

Laws designed to ensure that competition is not undermined by firms engaging in anti-competitive conduct are a common feature of many economies. In Australia, these rules have been embodied in the federal *Trade Practices Act 1974 (TPA)*. The TPA prohibits various anti-competitive agreements, the misuse of market power, and certain mergers and acquisitions.

NCP reforms gave these laws an economy-wide application. Formerly, due to Australia's constitutional law issues, these laws did not apply to state owned business enterprises or unincorporated associations.

Economy wide application enables a consistent and uniform application of competition law. This creates a level playing field that fosters competition across all forms of business enterprise and does not provide a regulatory benefit to any particular business class.

Despite the economic benefits of a level playing field across all sectors of the economy, governments recognised that there may be situations where competition benefits may not be sufficient to offset other social costs. In these circumstances the TPA allows for authorisation of conduct that would otherwise be considered anti-competitive.

Policy makers also recognised that while an economy wide competition law could protect existing competition, there may be regulatory barriers to competition in a market. For example, legislated monopolies for public utilities, statutory marketing arrangements for many agricultural products and licensing arrangements for various professions restricted the entry of competitors into various markets.

For the first five years of NCP, there was a systematic review of existing legislation and removal of legislation that restricted competition, unless it could be shown that the benefits as a whole outweighed the costs and restricting competition was the only way to achieve those benefits. While, in the end, this part of the reform program took longer than five years, it was largely completed by 2005. All governments have now established gate-

keeping processes to ensure that all new anti-competitive regulation is subject to the same tests.

But the reform package recognised that an economy wide authorisation process conducted by a well-resourced independent regulator, was a more effective mechanism for allowing restrictions on competition in the public interest compared to legislative restrictions on competition. It is therefore important that legislative reviews continue to address those restrictions on competition that have been enacted by legislation. If retention of that restriction is desirable the authorisation provisions of the Australia's competition law provide a means for granting an exemption.

### ***Improving the performance of publicly-owned businesses***

At the start of the reform program, government-owned businesses were common in Australia, especially in the utilities sectors. While privatisation of these businesses was consistent with the NCP reform program, it was not mandated. Rather, the reform program included components designed to improve the performance of these businesses and ensure that competition between private and government-owned businesses was fair and effective.

#### *Competitive neutrality*

To create a more level playing field, policy makers recognised that more was needed than simply applying competition law to all enterprises. In markets where government businesses compete with private businesses, governments could confer financial advantages upon their own businesses.

Hence, despite neutrality at law, private businesses might suffer a competitive disadvantage. When operating in markets where private operators are present, governments agreed to a set of competitive neutrality principles. These principles expressly did not apply to non-business, non-profit activities of government businesses.

#### *Structural reform of public monopolies*

Industry structure in some cases restricted the emergence of competition. For example, gas and electricity utilities in Australia were traditionally vertically integrated, and in many cases so were state-owned monopolies. While an economy wide competition law could protect competition, it couldn't create competition in industries that lacked a competitive market structure.

As part of NCP, structural reform of public monopolies was implemented to separate the contestable and non-contestable elements of vertically integrated government-owned businesses.

While this policy did not require governments to privatise their business activities, it did require introduction of a transparent process to identify

functions or activities that should stay with government, if the business was privatised. For example, regulatory functions should not be administered by private companies and were removed from entities to be privatised.

### *Prices oversight of public monopolies*

Australian government commitments to remove statutory restrictions on competition, introduce competitive neutrality and restructure public monopoly businesses were intended to expose government businesses to greater competitive pressure to encourage greater efficiency. However, it was also recognised that effective competition may not always be achievable, and that oversight of pricing by government businesses may be required. As a consequence, all Australian governments have established independent sources of advice on the prices charged by government-owned businesses that are monopoly suppliers of goods or services. As part of this process, these independent advisers are required to consult interested parties and publish their recommendations.

The federal government's prices surveillance regime (which is now contained in the Trade Practices Act, and is administered by the ACCC) was also amended to extend prices oversight arrangements to state and territory government business enterprises. However, the federal government agreed to intervene only where the relevant state or territory government failed to provide independent prices oversight of the business.

### ***Addressing entrenched monopolies***

#### *Access to essential facilities*

While removing regulatory and structural impediments to competition created the necessary preconditions for the emergence of competition in many markets, the NCP recognised that competition was not possible in markets with 'natural monopoly characteristics' where competition in the provision of infrastructure services was not viable. Consequently, Part IIIA (and similar telecommunication specific provisions in Part IIIC) was introduced to provide a national third party access regime for those facilities that could not be economically duplicated and were of national significance.

This regime was to be implemented under the auspices of the Trade Practices Act and was administered by the ACCC, the National Competition Council and the Australian Competition Tribunal. The regime provided for access to infrastructure on terms that were 'fair and reasonable'.

The purpose of this regime was to promote competition in markets dependent upon those infrastructure services as an essential input, rather than competition in the provision of the infrastructure services.

Contrary to views sometimes expressed in Australia, the access to bottleneck infrastructure regime was always intended to, and has always, applied to

privately and publicly owned assets. Indeed, from its inception access regulation applied to private assets, and has continued to be applied to private assets, in the electricity, gas, telecommunications, rail and airports sectors.

### *Prices oversight to constrain monopoly pricing*

The NCP recognised that despite all the measures outlined so far, including the third party access provisions, some entrenched monopoly issues may remain. In these markets an economy wide competition law may not constrain 'monopoly pricing'. The provisions of the former Prices Surveillance Act were adapted and incorporated into the TPA to perform this role.

## **2. Competition policy legislative and institutional arrangements**

### ***The legislative framework***

Let me now take a closer look at Australia's competition agency, the Australian Competition and Consumer Commission otherwise known as the 'ACCC'.

The ACCC is a federal independent statutory body responsible for enforcing all of Australia's competition laws.

However enforcement of consumer protection laws is shared between the ACCC and state agencies. While state consumer laws largely mirror the federal regime, the key difference is that, for constitutional reasons, federal laws largely regulate the conduct of corporations – whereas state laws regulate the conduct of individuals.

### ***The role of the ACCC under National Competition Policy***

As a result of NCP, the ACCC had increased responsibility for the administration of a number of industry specific access regimes created by the reforms.

The NCP reform process also saw the establishment of the ACCC in 1995, through the merger of the Trade Practices Commission and the Prices Surveillance Authority. The ACCC was given new areas of responsibility as it was recognised that simply privatising or deregulating state-owned monopolies would, on its own, do little to promote competition.

For the start of NCP, the National Competition Council (NCC), an independent government body established under the NCP process, assessed each government's reform agenda against the commitments established by the NCP process. Incentives for reform were provided by annual competition payments to the states and territories from the federal government.

The payments were reduced where the NCC recommended that penalties be imposed for lack of progress of NCP related reforms. This represented an

important tool in the process of implementing the widespread competition reforms right across the Australian economy.

### *The legislation*

Australia has had a comprehensive competition law since 1974. The Trade Practices Act 1974 (TPA) provides the legal foundation for competition and consumer protection law in Australia. The objectives of the Act are:

- to promote competition;
- to promote fair trading (as between competing businesses and as between businesses and consumers); and
- to ensure consumers are protected in their dealings with business.

The TPA generally prohibits corporations from engaging in anti-competitive conduct (also referred to as restrictive trade practices in the law) and unfair trading practices, including misleading and deceptive conduct. These include:

- anti-competitive practices generally and in the telecommunications industry (Parts IV and XIB);
- agreements that substantially lessen competition, market sharing or price fixing agreements, and agreements that give rise to
- primary or secondary boycotts;
- abuse of dominance (misuse of market power);
- exclusive dealing;
- resale price maintenance;
- mergers or acquisitions which substantially lessen competition; and
- unconscionable conduct (Part IVA) – this involves business taking unfair advantage in commercial and consumer transactions.

The TPA also regulates mandatory codes of conduct in particular industries (Part IVB), provides consumers protection from unscrupulous business practices (Part V) as well as imposing product liability on manufacturers of defective goods (Part VA).

The ACCC's role in ensuring compliance with the TPA is a broad one.

It covers nearly all sectors and industries and all forms of entities involved in trade or commerce, including government business enterprises and unincorporated entities as well as trading and foreign corporations.

### *Regulated industries*

Parts of the Trade Practices Act deal with regulated industries and prices surveillance. In this area the ACCC's role is to ameliorate the market power of bottleneck infrastructure in particular sectors and ensure appropriate access to promote competition in particular sectors: including in energy, telecommunications, airports; ports, rail and post.

The ACCC ensures that participants in the regulated industries comply with access obligations, and revenue and pricing arrangements that apply to such



facilities such as gas transmission pipelines, electricity networks, telecommunications networks and airports.

The ACCC also has responsibilities under a range of other legislation including:

- the *Airports Act 1996* – where the ACCC has a detailed regulatory role on prices and access and quality of service;
- the *Australian Postal Corporation Act 1989* – where the ACCC arbitrates on access to the postal network;
- the *Broadcasting Services Act 1992* – the ACCC provides approvals in respect of pay TV licences and the access regime for digital TV
- the *National Gas Law 2008* – enacted by each Australian government
- the *National Electricity Law 2005* – enacted by each participating Australian government;
- the *Telecommunications Act 1997* – relating to the telecommunications-specific provisions in the Trade Practices Act
- the *Telecommunications (Consumer Protection and Service Standards) Act 1999*;
- the *Water Act 2007* – under which the federal government oversees water management in Australia's Murray-Darling Basin river system; and
- the *Trade Marks Act 1995* – under which the ACCC approves certification trade marks.

### *The ACCC as an organisation*

As for our structure, we have seven full-time commissioners and more than 800 staff across Australia.

The background of commissioners varies with a range of legal, economic, business and technical skills.

Sitting as a Commission we make all major decisions but we don't formally manage staff – our operation is more like a board.

Consideration of issues and decision-making occurs through a committee structure – which provides for more detailed consideration of issues before submission to the full Commission.

These committees include: Adjudication; Enforcement; Mergers; Regulated Access, Pricing and Monitoring; and Communications.

Discussion on all issues around the Commission table is vigorous, with the diversity of views from Commissioners reflecting their different backgrounds and expertise while also contributing to the robustness of the debate.

The ACCC also receives up to 110,000 complaints or enquiries each year – and these are filtered down to the matters that we look at more closely by the consideration of a number of factors including: whether the conduct is of

significant public interest or concern; whether the conduct results in significant consumer detriment; whether our action is likely to have a worthwhile educative or deterrent effect; involves a new or emerging market issue; is industry-wide and the like.

### **3. Some topical competition policy reform issues and agendas**

It has been almost 15 years since the NCP reform program was implemented. So what were some of the results?

The 2003 OECD Economic Survey of Australia<sup>1</sup> noted that the NCP reform has reaped a number of benefits for its economy, including a substantial contribution to improving labour and multifactor productivity and economic growth.

The survey included estimates from Australia's Productivity Commission (PC) that the country's GDP was about 2.5 per cent higher than it would otherwise have been, and Australian households' annual incomes were on average around A\$7,000 higher as a result of competition policy.

The findings of the PC's 2005 report<sup>2</sup> were largely consistent with the views of the 2003 OECD Economic Survey. It found that NCP had delivered substantial benefits to the Australian community which, overall, have greatly outweighed the costs. NCP has:

- contributed to the productivity surge that has underpinned 13 years of continuous economic growth, and associated strong growth in household incomes;
- directly reduced the prices of particular goods and services;
- stimulated business innovation, customer responsiveness and choice; and
- helped meet some environmental goals, including the more efficient use of water.

The PC noted that not all reforms have delivered (for example, electricity market reforms have as yet failed to deliver a fully effective national market) and there have been transitional costs (for example, reforms to improve the efficiency of public utilities and other infrastructure services have seen reductions in employment in those industries).

However, the PC concluded that these points do not detract greatly from the overall benefits NCP has produced for the community as a whole, and further noted:

*'...though many of the costs have now been incurred, NCP will deliver substantial ongoing benefits. By opening up large new areas of the*

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<sup>1</sup> Organisation for Economic Cooperation and Development, 2003, *Policy Brief: Economic Survey of Australia 2003*.

<sup>2</sup> Review of National Competition Policy Reforms, Productivity Commission, 14 April 2005

*economy to competition, the reforms have reinforced the role of tariff reductions and other policy changes in the development of a more cost conscious, responsive and innovative business culture in Australia. This will facilitate continuing productivity improvement and provide a platform for future wages growth and increases in living standards.'*

While competition policy has delivered a number of benefits, the PC found that further work is necessary in the areas of:

- strengthening the operation of the national electricity market;
- building on the National Water Initiative to enhance water allocation and trading;
- developing coordinated strategies to deliver an efficient and integrated freight transport system; and
- arrangements to screen any new legislative restrictions on competition.

The PC report is a significant tool for the competition advocate. The detailed quantitative and qualitative analysis provides hard evidence of the positive impact of competition policy on the Australian economy and society over a ten year period.

Another driving force for competition reform has been the Council of Australian Governments (COAG). This is the peak intergovernmental forum in Australia comprising of the Prime Minister, State Premiers, Territory Chief Ministers and the President of the Australian Local Government Association (ALGA).

It was established in May 1992 and its role has been to initiate, develop and monitor the implementation of policy reforms that are of national significance and which require cooperative action by Australian governments.

Issues may arise from, among other things: Ministerial Council deliberations; international treaties which affect the states and territories; or major initiatives of one government (particularly the federal government) which impact on other governments or require the cooperation of other governments.

National Competition Policy has been discussed at this forum and the cooperation of all Australian governments was necessary in ensuring key NCP objectives were implemented.

Furthermore among its current reform agenda, COAG listed boosting productivity as one of its key priorities.<sup>3</sup> The COAG Reform Council was established to drive this agenda by aiming 'to strengthen accountability for the achievement of results through independent and evidenced-based

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<sup>3</sup> [http://www.coag.gov.au/crc/reform\\_agenda.cfm](http://www.coag.gov.au/crc/reform_agenda.cfm)

monitoring, assessment and reporting of the performance of all governments'.<sup>4</sup>

### *Australian Consumer Law*

Next, the improvement of consumer protection legislation in Australia has received much attention during the past two years.

Currently, the consumer protection provisions of the Trade Practices Act improve markets for consumers by allowing them to make informed decisions. In essence these provisions prohibit businesses from engaging in misleading and deceptive conduct in their dealings with consumers.

At the same time, this drives competition between producers to supply goods and services that consumers want at prices they are willing to pay. However, in saying this, federal, state and territory governments recognised that the existing regime required an overhaul.

In early 2009, the Australian Consumer Law (ACL) reforms were introduced into the Australian Parliament. The reforms collectively represent one of the most significant developments in consumer law since the inception of the Trade Practices Act in 1974.

They complement recent changes to competition law and are underpinned by the proposal that Australia should move to a single national law for consumer protection unifying state, territory and federal laws that cover fair trading and consumer protection.

It includes the following new remedies, consumer protection provisions and enforcement tools:

- civil pecuniary penalties – which will allow the ACCC to seek proportionate penalties to breaches and enable us to more effectively promote compliance with the law;
- disqualification orders – that will restrict individuals from managing corporations;
- unfair contract terms – that will allow the ACCC to address consumer detriment in standard form business-to-consumer contracts;
- substantiation notices that can be issued to businesses by the ACCC to verify claims made about its products or services;
- infringement notices – for breaching particular consumer protection provisions of the TPA;
- public warning powers – that may be particularly useful in terms of product safety matters; and
- greater ability for the ACCC to bring representative actions and redress for consumers who may not be parties to initial enforcement action.

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<sup>4</sup> <http://www.coag.gov.au/crc/index.cfm>

A second tranche of reforms is expected to be introduced through a Bill into the Australian Parliament during this year. This will contain additional provisions of the Australian Consumer Law reforms including:

- a new national product safety system;
- the introduction of best practice reforms in State and Territory consumer laws; and
- the introduction of the remaining Australian Consumer Law provisions drawn from existing consumer protection provisions of the Trade Practices Act.

It is anticipated that the Australian Consumer Law will be fully implemented by 1 January 2011, which together with the competition law reforms will mark a point of significant evolution for the Australian competition and consumer framework.

### *Criminalisation of cartel conduct*

A prime focus of the ACCC's competition enforcement activity over recent years has been shutting down cartels – secret collusive agreements between competitors to fix prices, rig markets, allocate markets between each other and collusively bid.

Legislation to criminalise cartel conduct came into effect in July 2009 and represented one of the most significant Australian competition reforms in recent times. Australia now has a dual criminal and civil cartel enforcement regime which has provided the ACCC with the ability to respond to cartel conduct in a proportionate and appropriate way.

The ACCC, in conjunction with the Commonwealth Director of Public Prosecutions (CDPP) can prosecute participants in the most serious hard core cartels with a view to securing criminal convictions and gaol sentences of up to ten years, as well as civil penalties of up to \$10 million, or up to 3 times the gains made as a result of the cartel, or 10 per cent of the group's turnover. There is also the prospect of being barred from corporate management for life.

In providing a gaol term for cartel behaviour, Australia has joined other jurisdictions such as Canada, the United States, the United Kingdom and Japan.

The advent of criminal sanctions means those who engage in cartel conduct risk losing their liberty, which is perhaps the greatest deterrent. It is also recognition of the damaging impact that cartels have on the competitiveness of the economy by artificially driving up prices, stunting innovation and propping up inefficient businesses.

#### **4. Competition policy reform case studies**

It's time for me to outline some competition policy reform case studies in the areas of:

- energy regulation;
- water; and
- telecommunications.

##### ***Towards national energy markets***

The regulation of electricity and gas markets has undergone major changes in recent years in Australia.

The Australian Energy Regulator (AER), a constituent part of the ACCC, was established in 2005 under Part IIIAA of the Trade Practices Act 1974 and operates as a separate legal entity.

The AER regulates the wholesale electricity market and is responsible for the economic regulation of the electricity transmission and distribution networks in the national electricity market (NEM). The NEM itself was one of the major NCP reforms, creating a single market across all states and territories except Western Australia and the Northern Territory.

The AER is also responsible for the economic regulation of gas transmission and distribution networks and enforcing the national gas law and national gas rules in all jurisdictions except Western Australia.

The principal functions of the AER in relation to electricity networks include:

- making electricity transmission and distribution regulatory decisions;
- developing and publishing service standards to be applied to electricity transmission and distribution networks;
- making and amending guidelines for the ring-fencing of operations and information flows between activities, or within a business, of a regulated entity;
- promulgating the regulatory investment test referred to in the National Electricity Rules (the Rules);
- providing advice to governments on the performance of the NEM and related policy issues; and
- enforcing the National Electricity Law (the Law) and the Rules made under that Law and investigating and bringing proceedings in connection with any breaches.

From July 2008, the AER became the economic regulator for covered natural gas transmission and distribution pipelines in all states and territories except for Western Australia.

The AER's functions and powers in relation to the economic regulation of covered gas transmission and distribution pipelines include:

- approval of certain access arrangements required to be submitted by service providers under the National Gas Law and National Gas Rules;
- review of annual reference tariff variations in accordance with relevant access arrangements;
- annual monitoring of compliance of service providers' obligations under the National Gas Law and National Gas Rules;
- undertaking enforcement functions as required in relation to breaches of the National Gas Law, National Gas Rules and Regulations;
- hearing disputes in relation to the terms and conditions of access for relevant pipelines;
- approval of competitive tendering processes and terms and conditions of access for competitive tender pipelines as required under the National Gas Law and National Gas Rules; and
- other functions and powers required to be undertaken under the National Gas Law and National Gas Rules including those associated with the Gas Market Bulletin Board.

### *Challenges facing Australia's energy market*

The impact of climate change and related policies is challenging energy markets across the world.

Questions remain on how to best coordinate the connection of new remote generators, such as new wind generators, to the energy network— for example, how to get connection assets built to an efficient scale to accommodate future generation capacity.

Then of course will climate change policies lead to short term generation capacity shortfalls? More generally, an increased reliance on wind and the wider use of small solar photovoltaic systems will lead to greater variability in flows across the networks, posing challenges for reliability and power system security.

In the coming years, Australian consumers will be faced with increasing energy costs. Some of these costs can be attributed to major infrastructure upgrades underway by energy providers and there will be a need for greater communication of why this investment is taking place and what will be the long-term benefits for consumers.

Another emerging concern over the past couple of years is an increasing incidence of generators exercising market power in the electricity market. The National Electricity Market was designed to minimise the risk of market power through an interconnected grid that allows competition between generators throughout most parts of Australia. Significant investment in networks, including regional interconnectors, has made this possible. The national market is now fully aligned around 70 per cent of the time. However there are circumstances where a generator is required to be dispatched within a particular region and can easily exercise market power.

This is most evident at times of peak demand, and typically on days of extreme temperatures.

The opportunities for market power are further enhanced if part of the power system—for example, an interconnector—is constrained. This scenario can result in an islanded market with high demand and tight supply.

In a relatively concentrated market, and given the “pure” nature of the electricity market, this can lead to significant opportunities for price gouging.

In a competitive market, sustained above-competitive pricing will attract new entry to take advantage of opportunities for profit. But the response may be muted if high prices are more a reflection of an incumbent’s ability to exercise market power and control outcomes in a way that damages potential competition.

The National Electricity Rules leave regulation of anti-competitive conduct to the Trade Practices Act. The Australian Energy Regulator assists the ACCC to monitor conduct in the wholesale electricity and will continue to do so.

But if market power problems become entrenched, new policies in market structure or regulation may be needed to ensure the energy sector best serves the needs of consumers and competition.

### ***Promoting efficient use and competition in the water sector***

Now let me examine competition in Australia’s water sector.

Water has not to date been fully valued or allocated efficiently. Australia is not unique in this. Throughout the world water supplies are underpriced and water scarcity is addressed through some form of non-price rationing, even today. Over the past 15 years or so, it has become clear that this approach has not served Australia well.

Undoubtedly, our use of water in the past has reaped great rewards in terms of the development of industries, the growth of the economy and the modernisation of Australia.

But there has been a cost, not just in terms of environmental degradation of productive land and river systems. There have also been costs in terms of lost agricultural production value, lost investment and increasing uncertainty about the availability of water.

The reasons for this have, in large part, been the over-allocation of water and the lack of effective mechanisms to trade water, exacerbated by the falling availability of water during Australia’s longest and most serious drought.

The Murray-Darling Basin, Australia’s most valuable river system, flows through several of Australia’s states and since 1886, legislative arrangements



have established that its streams were state property and should be administered by state agencies.

This invariably led to approaches to water use which were based on state interests with little regard to flows to other jurisdictions.

However, the river system does not recognise state borders, nor does the environment that depends upon it.

The federal *Water Act 2007* was introduced to focus on specific reform options in the Basin, by adopting a national approach.

The ACCC was assigned new functions from the Water Act in relation to the Murray-Darling Basin.

These include:

- advising the Minister for Climate Change and Water, Senator Penny Wong, on water charging rules and water market rules;
- monitoring compliance with and enforcing these rules; and
- advising the new Murray-Darling Basin Authority on water trading rules as part of the Authority's development of the Basin Plan.

The water charge rules and water market rules must contribute towards the development of an efficient water market by removing barriers to trade while protecting the interests of third parties and ensuring incentives for efficient investment remain.

### *Challenges facing regulation of the Murray-Darling Basin*

It has long been recognised that water reforms extend beyond competition policy matters and have far greater implications on the community.

Delayed and inadequate implementation of the water reforms have imposed large costs on the community and especially irrigators. As a result, today the reforms are even more urgent.

Although there has been some progress, the spirit of cooperation and goodwill must continue to ensure the national approach to water use of the Murray-Darling Basin is the only approach.

The development and implementation of various water rules will set the foundation of a competitive water trading marketplace and through its operation recognise the scarcity and true value of water.

## ***The National Broadband Network process and telecommunications regulatory reform***

Last year saw two key policy announcements that will reshape the Australian telecommunications landscape over the next decade.

In April 2009, the federal government announced its national broadband network (NBN) plan to connect 90 per cent of Australians to a fibre-to-the-premises network and the remaining 10 per cent to wireless and satellite broadband over the next 8 years.

Then, in September last year, the Minister for Broadband, Communications and the Digital Economy, Senator Stephen Conroy, announced a legislative package to address access, competition and underlying structural issues in telecommunications markets during construction of the NBN.

### *The NBN process*

There has been, for some years, industry discussion about upgrading Telstra's fixed copper network with fibre optic enhancements to improve broadband performance and the availability of broadband services. A couple of years ago Telstra and another group of telecommunications companies (known as FANOC or the G9) proposed alternative fibre-to-the-node (FTTN) networks.

These proposals were overtaken in 2008 when the newly elected Australian Government established a tender process for a national broadband network. While no particular network technology was mandated by the process, the prevailing approach was to propose an FTTN upgrade to 98% of Australian homes and businesses.

After considering reports from the ACCC and the expert panel assessing the proposals, the Government decided to abandon the tender process and create a new public company, NBNco, to develop a fibre-to-the-premises (FTTP) network, complemented by wireless and / or satellite services in regional areas.

It was announced that NBNco would initially be majority government-owned and would provide services on an open access, wholesale-only basis, thus overcoming the current problems associated with Telstra's vertical integration and helping to ensure more competitive value-adding broadband services.

Rollout of the FTTP network has begun in the state of Tasmania and is expected to be completed throughout Australia in various stages. Private investment and/or the vending-in of relevant existing assets by current or potential service providers is envisaged, subject to control and ownership restrictions to preserve NBNco's status as a structurally separate, wholesale-only service provider, and full privatisation is envisaged when NBNco is fully up and running.

## *Telecommunications regulatory reform*

In the transition period to the NBN, the federal government has proposed new legislation to facilitate the shift to the new network and ensure that communications markets are as competitive as possible. The legislative reforms have two main aspects – changes to address the incumbent Telstra’s vertical and horizontal integration and changes to the current telecommunications-specific regulatory regime.

The uneven development of competition in the Australian telecommunications industry so far is likely due to the underlying structural issues, particularly in relation to fixed line markets. The availability of fixed line voice or broadband services has been largely dependant on access to Telstra’s copper network.

The size and ubiquity of Telstra’s fixed line network assets, its vertical and horizontal integration and consequent dominance of these communications markets (particularly fixed line voice markets), has long posed substantial challenges to the development of competitive, innovative and responsive communications services in Australia.

In announcing the proposed legislative changes, Senator Conroy said:

*“the reforms address the structure of the telecommunications market and provide Telstra with the flexibility to choose its future path” with the “Government’s clear desire for Telstra to structurally separate, on a voluntary and cooperative basis.”*

The proposed legislation will allow Telstra to voluntarily submit an enforceable undertaking to the ACCC to structurally separate into different corporations, without common ownership or management, control of its fixed line network from its retail operations, if Telstra wishes to purchase 4G spectrum in the future. Alternatively, if Telstra chooses not to structural separate, the legislation imposes a strong functional separation framework on Telstra, requiring that:

- Telstra conduct its network operations and wholesale functions at arm’s length from the rest of Telstra;
- Telstra provides equivalent price and non-price terms to its retail business and non-Telstra wholesale customers; and
- this equivalence of treatment is made transparent to the regulator and competitors via strong internal governance structures.

Addressing these structural issues will lead to greater competition and innovation in telecommunications, encourage new and better services and more competitive prices.

The second aspect of the legislative package proposes to amend the current telecommunications-specific regulatory regime to improve competition and access while the NBN is being rolled out over the next 8 years. It proposes to

streamline the arrangements allowing parties to access regulated services, and the ACCC will:

- determine up-front terms and conditions for a three to five year period, following consultation with industry;
- determine principles to apply for longer periods; and
- make binding rules of conduct to immediately address problems with the supply of regulated wholesale services

The legislation will also reform the arrangements so that the ACCC can address breaches of competition law and conduct damaging to the market.

Streamlining access arrangements to infrastructure under the Trade Practices Act and allowing the ACCC to determine competitive access terms and conditions up front will promote greater regulatory certainty for industry and investors and will ensure greater competition, benefiting all consumers in the transition to the NBN.

The proposed legislation is currently being considered by the Australian Parliament. The reforms represent a major shift and will be fundamental to improving competition in the short to medium term. In the longer term, the structure and design of the NBN, and the accompanying regulatory regime, will be critical to developing effective competition in communications markets.

#### *Challenges facing the telecommunications sector*

Looking forward, future issues are likely to involve more than just the pipes and infrastructure. The convergence between traditional and new media, development of new applications and emergence of the digital economy raise new challenges and considerations for industry participants and regulators alike. To that end, maintaining and promoting competition in content and higher layer applications may emerge as particularly important issues in an NBN environment.

We expect the transition to an NBN to be a time of significant structural and competitive change in the industry. We are working hard to ensure regulatory certainty during this time as the changes on foot now should lead to a more dynamic and competitive telecommunications industry for the benefit of Australian consumers.

## **5. Capacity building and cooperative activities**

Finally, I'll discuss the importance of cooperation with counterpart international competition agencies and the successes achieved so far as a result of information sharing.

With globalisation, many competition problems transcend national boundaries, for example: cartels; restrictive practices in air and sea transport; mergers involving transnational corporations.

Firms which operate in several countries may be subject to differing national competition rules which can increase the costs they face and make it harder for them to compete with overseas competitors.

Partly, the inclusion of competition policy in regional trade agreements, such as Australia ASEAN New Zealand Free Trade Agreement is in direct response to the recognition that international trade can provide the rationale and the opportunities for firms to engage in anti-competitive conduct. Competition policy is seen as an additional tool in promoting confidence in future trade between members.

Australia actively cooperates with other economies on competition matters, including on economic and governance issues and in developing appropriate frameworks for promoting competition. Australia sees considerable value in encouraging such cooperation. Coordination and cooperation with other countries can help to minimise the distorting effects from anti-competitive practices, particularly as trade is increasingly globalised, with commercial markets spanning more than one national jurisdiction.

Cooperation and information sharing can be an important learning tool for developing economies and also assists Australia to better understand competition issues and potential best practice, both for the Australian economy and for other societies.

Competition policy in free trade agreements can establish formal links between competition authorities in the respective countries. Establishing procedures such as notifications in free trade agreements can create a solid basis for a continuing relationship. In some cases, the inclusion of competition policy in free trade agreements has provided additional impetus for establishing a competition authority. It importantly sends a clear signal to the business communities in both jurisdictions of the importance of competition policy and that anti-competitive conduct will not be tolerated. If handled by a transparent consultative process and with collaboration, business stakeholders can be advocates of the initiatives not the critics.

#### *Case specific cooperation*

There have been a number of recent cases where the ACCC has worked closely with other agencies to collaborate on cases or to better understand widespread collusive practice. These include the acquisition of Wyeth by Pfizer where inter-agency cooperation succeeded in obtaining a sustainable outcome across at least three continents (Europe, North America and Australia).

In the air cargo cartel investigation, international cooperation and coordination has been instrumental in bringing air cargo cartelists to justice. To date, eleven airlines have been subject to ACCC proceedings for alleged price fixing in the air cargo industry.

In September 2009 the ACCC instituted proceedings alleging three construction companies engaged in price fixing and misleading or deceptive conduct in tendering for government construction projects in Queensland, a practice known in the building industry as 'cover pricing'.

Cover pricing involves one company colluding with another during the tender process to obtain a price that is intended to be too high to win the contract for the project on price alone. The company then submits this price as a genuine tender. The ACCC was aware that the United Kingdom's Office of Fair Trading (OFT) was running a similar investigation into the practice of 'cover pricing', and as part of our investigation we approached the OFT to better understand:

- the practice of cover pricing as it works in Australia and in the United Kingdom; and
- the approach they were taking in their investigation.

This exchange of information assisted both agencies in progressing their investigation –including evidence gathering and information on what types of defences the parties were likely to use.

#### *Cooperation in consumer protection matters*

International cooperation is also becoming an essential tool in consumer protection, and Australia is well engaged on this front also. We have recently assumed the presidency of the International Consumer Protection Enforcement Network or ICPEN, and hosted the November 2009 meeting.

By way of example of international co-operation, the ACCC recently obtained final orders for false and misleading conduct in relation to an international health scam. E-Books was an operation claiming cures for a wide range of health conditions including acne, asthma, multiple sclerosis, menopause and prostate cancer, and these were sold to more than 60,000 consumers internationally.

The scam was brought to the ACCC's attention by the Washington State Attorney General's Department. The ACCC's investigation was carried out in conjunction with the Americans, who also filed their own proceedings in the matter.

#### *Regional capacity building*

The ACCC continues to work with our counterparts in ASEAN and throughout the Pacific region to develop effective competition regimes. The need for a collaborative approach to competition enforcement is increasing. More cartels are now operating on a global basis and at the same time anti-competitive mergers and acquisitions can have a wide ranging effect.

In recent years there have been positive developments with the introduction of new competition regimes in Vietnam, Singapore, China which complement existing regimes in Indonesia, Papua New Guinea and Thailand.

The ACCC is committed to helping newly established regimes as well as those countries which are developing a competition law. The ACCC has learnt extensively from the experience, both good and bad, of other competition agencies.

Whether it is through staff secondments, training programs or simply exchange of information the ACCC has worked closely with many of the competition authorities and policy agencies in our region. This type of work is an important commitment from the ACCC and is something which we will continue to offer to counterparts in our region.

However, working with developing competition authorities to assist in the establishment of an effective competition regime is simply the start. There is a continued need for cooperation and collaboration between competition authorities on enforcement cases to ensure that businesses recognise that any anti-competitive conduct will not be tolerated.

## **Conclusion**

Undoubtedly open and competitive markets, driven by consumer demand, provide the best means to allocate resources for the benefit of communities and nations.

Competition policy and the regulation of markets play an important role in promoting a competitive economy as well as ensuring access to markets that are dependant on infrastructure services.

Consistency in competition policy and enforcement is needed in order for businesses to have confidence to innovate, expand and further develop. An independent regulator is more likely to provide consistency in enforcement and regulatory activities.

Exceptional times such as the Global Financial Crisis may stimulate some rethinking on the role of government intervention and regulation. However, the focus should remain on addressing substantive market failure. Competition policy principles applied in Australia to date retain this focus.

As also demonstrated by the Australian experience, competition policy and regulation is a constantly evolving process. Lessons will be continued to be learnt and further fine tuning, improvements and reforms may be necessary.

Of course closer cooperation and collaboration with regional nations is beneficial to all involved. Information sharing and the recognition of different experiences, can lead to stronger ties between nations and greater cultural and societal understanding.