I: Introduction

Australian federalism is characterised by dynamics that are almost geological in their expression. Movement is typically so incremental, that few people notice its implications for the form of governance in Australia. Only occasionally is the movement so abrupt and violent, that it jolts the traditional complacency towards our benign polity.

Economic regulators, particularly those who regulate utility providers that service not only local requirements but often the national economy, can readily find themselves caught in a tectonic crunch of constitutional interests. Arguments about the distribution of powers within the federation involve assessments about the costs, benefits and risks associated with the various models. Federalists are often motivated by concerns about too much power becoming concentrated in the hands of one government. Centralists place greater weight on the apparent economic inefficiency of failing to do so.

Contents

Lead Article 1
From the Journals 10
International Regulatory Decisions 13
Regulatory Decisions in Australia and New Zealand 20
Notes on Interesting Decisions 31
Regulatory News 35

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* Chairperson, Essential Services Commission (ESC), Victoria. Views expressed in this article are those of the author and do not represent those of the ESC or the Victorian Government

1 See Howard (2007a) and Brumby (2008), respectively.
to debates about federalism. Section V concludes with an unwelcome prophesy.

II: In one direction only

Debates about the nature of Australian federalism are older than the federation itself. They began with the constitutional conventions of the late nineteenth century, went into abeyance during the nation’s early infancy only to re-emerge with a series of High Court decisions that defined sections of the Constitution in ways that seemed contrary to their common reading.

With the advent of the Second World War, the States agreed to the Commonwealth imposing its own income tax to the exclusion of their own income taxes. In time, this undermined the States’ fiscal standing leading to heated clashes between heads of government. The colossal battles between Prime Minister Gorton and Premiers Bolte and Askin were a prelude to many less-edifying Premiers’ Conferences and meetings of the Council of Australian Governments (CoAG).

Decisions by the High Court in more recent times have been no less potent in their implications for federalism. These include the Court’s decisions regarding the application of the external affairs powers in the Tasmanian Dam case (1983); its broad definition of an excise (1997); and the almost unlimited extension of the Commonwealth’s capacity to legislate in relation to constitutional corporations in the Work Choices decision (2006).3

The evolving lexicon of the federalism debate is instructive. Whereas it was once debated in terms of conferred, enumerated and reserved powers; in time, these notions were replaced by terms such as fiscal federalism, vertical fiscal imbalance and horizontal fiscal equalisation. This led to calls for a ‘New Federalism’—Mark 1 (Whitlam), Mark 2 (Fraser), Mark 3 (Hawke) and Mark 4 (Keating)—to address the imbalance between policy responsibility and fiscal capacity (see Hollander and Patapan 2007).

By the new century, the Commonwealth Government’s commitment to federalism as an organising principle for governance in Australia was deteriorating rapidly. Minister Tony Abbott’s dismissive reference in 2003 to ‘feral federalism’ was an early expression of the self-referential framework that would soon come to dominate the national landscape.

Despite the Prime Minister’s declaration after the Work Choices decision that he had no desire ‘to embark upon some orgy of centralism’, the States were now fully exposed to unprotected federal relations.4

Less than a year later, the Prime Minister (Howard 2007a) articulated his doctrine of ‘aspirational nationalism’ whereby any on-going commitment to federalism was reduced to little more than a discretionary item. Moreover, that discretion would lie only within the hands of one level of government, namely, the Commonwealth. In effect, Canberra would single-handedly determine what was to be ‘the best possible outcome for Australians wherever they might live and by whatever method of governance will best deliver those outcomes’. Little if any regard was paid by this new, self-referential doctrine to the unpredictability, instability and inefficiencies created for State, Territory and local governments; not to mention communities and the Commonwealth public service.

Although Craven (2007) concluded, ‘This has been federalism’s worst decade since the 1920s’, it was also a time that saw a burgeoning of creative descriptions and prescriptions for the Australian federation.

Old favourites such as collaborative federalism, comparative federalism and competitive federalism were reprised. Newer and more creative suggestions inter alia have included: responsible federalism, parallel federalism, opportunistic federalism, ad hoc federalism, selective centralism, pragmatic federalism, strategic pragmatism, optional federalism, conditional federalism, cooperative centralism and modern federalism.5

In this contest of ideas and branding, it is ‘cooperative federalism’ that has emerged as the modus operandi for the Council of Australian Government (CoAG) since late 2007. This shift has calmed the great waves of conflict and distraction caused by the self-referential prescriptions for Australian federalism that preceded it.

The apparent calm of cooperative federalism may belie the existence of deeper forces. Justice French (2008), as he was then, questions whether cooperative federalism contains the seeds of its own demise via its tendency to elevate issues to national prominence. He

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2 Solomon (1999) and Lynch (2007) provide very accessible histories of these High Court decisions.


highlights that, ‘For every topic which is treated as national becomes potentially a matter which, somewhere along the line, it can be argued is best dealt with by a national government.’ Leading him to conclude that even under cooperative federalism, ‘The pressure seems to be in one direction only.’

It would seem that the centripetal forces of constitutional and economic rationalisation, and the gravitational draw of the federal purse, remain intact. In which case, they will continue to fuel the accretion of State powers towards a supposed pax Canberrica.

Economic regulation is not free of these gravitational behemoths. There are few areas of State-based utility regulation where the pull of the centre cannot be felt. In some cases, State-based regulation has succumbed completely to the forces of gravity – lost presumably forever to bodies over which representative State Parliaments have little or no sway. But then again, the law of constitutional gravity is not incontrovertible like its cosmological counterpart.

The former Victorian Premier and hopeful seer, Sir Henry Bolte, querulously predicted (in 1967) that the time would come when the federal government would be ‘blamed for everything: an unmade road, the lack of an ambulance, a leaking school tap. The lot. ‘At which point, he believed, the Commonwealth would ‘come to the States and say: take it back’.

In the meantime, shifts in the Australian federation will continue whether under the banner of cooperative federalism or aspirational nationalism. Whatever the context, incremental changes to federal arrangements as well as federalism in toto need to be subjected to public scrutiny and open debate. Economics and economic regulators have an important evidentiary role to play.

III: Improving the facts, not the theory

It would seem that most of the recent debate about federalism in Australia has been conducted by scholars of constitutional law and public administration. Economic analysis has been brought to these debates only scantily and selectively. More and better economic facts are needed.

Applying economic principles to these debates is not just an exercise in intellectual elegance. It provides a more tangible basis for assessing the costs and benefits (quantitative or qualitative) of alternative proposals. Economic analysis can also provide insights into appropriate institutional design.

Perhaps the first issue to be tackled is to understand the direction of causality between the distribution of powers and the nature of Australia’s political institutions. Does the distribution of powers reflect the benign nature of our national polity? Or is the converse true? Are our benign political institutions the historical consequence of the distribution of powers in the Australian federation?

These are not gratuitous questions. They go to the heart of identifying the tolerance to risk that lies behind the struggle between federalism and centralism. Nor are these questions easily answered empirically or experimentally. The control group and the trial group inconveniently coincide. Moreover, Australian history suggests that any transfer of power to the centre, is akin to a one-shot experiment. As argued previously, once powers are centralised they are not easily dislodged. Whether an irreversible risk is worth taking will depend on the player’s risk profile. The history of constitutional reform in Australia can only lead to a conclusion of some degree of risk aversion in relation to the centralisation of power.⁷

The second element in this calculus relates to the community’s perception of up- and down-side risks associated with the transfer of power to Canberra. This will affect the community’s calculation of potential utility gains or losses. The probabilities assigned to these outcomes will determine the community’s ex ante expected utility. The community’s risk aversion means that it will only ‘take a punt’ on centralisation if either: (i) the upside pay-offs are perceived to greatly outweigh the downsides losses; or (ii) the probability of an upside outcome greatly exceeds the downside probability. In all other instances, the community would rather transfer some known ‘quantity’ of power rather than taking a chance on too much centralisation.

The community’s willingness to pay (that is, transfer power to the Commonwealth) is not easily calculated. The designers of the Australian Constitution sought to construct institutions that would ensure the community avoided having to face this problem too often. Otherwise known as ‘checks and balances’, these mechanisms divide powers vertically and horizontally. The (vertical) division of powers between different levels of government was to be changed via two

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⁷ Grewal and Sheehan (2003) note, ‘Section 51 has proved to be extremely stable and has been amended only twice during the passed one hundred years.’ Of those two amendments, the authors note, only one (in 1946) had any bearing on the balance of power between the Commonwealth and States.

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⁶ Albert Einstein (1879 - 1955) is reported to have once said, ‘If the facts don’t fit the theory, change the facts.’
mechanisms only, namely, public referendum or parliamentary referral. In reality, the High Court has been the agent of change rather than the people or their parliaments.

The Australian Constitution, like its American predecessor, also adopts Montesquieu’s principles for the (horizontal) separation of powers between three estates: the executive, legislature and judiciary. It is beyond the scope of this article to consider the evolving interaction between the three Australian cousins, which are governed by convention as much as by the Constitution.

There is a third protective device affecting the distribution of powers in the Constitution that is rarely mentioned. The Constitution seeks to internalise costs and benefits for each level of government via an aggregation of countervailing powers. For example, the Commonwealth is conferred with responsibility for diplomacy and defence. Mess up one responsibility and there are consequences for the other. Disrupting this internal alignment of costs and benefits needs to be considered very carefully. If pursued haphazardly, a redistribution of powers will create externalities that distort decision-making elsewhere. In the increment, this may be difficult to measure, but the total impact of many incremental changes could be significantly distortionary and result in perverse outcomes.

There are also spill-over benefits from aggregating these responsibilities. Reconnaissance by diplomats and drones comes at a cost for Foreign Affairs and Defence (respectively). The marginal cost of sharing this information within the one level of government is negligible, while the benefits may be considerable. Much higher transaction costs would be incurred in moving information between different levels of government.

While it may be efficient to have one level of government responsible for both drones and diplomats, Craven (2004) has noted that, ‘Tanks and treaties are important, but they do not amount to a functioning society.’ Craven’s ‘functioning society’ is the raison d’etre for economic regulation. Typically, but not exclusively, regulation seeks to address the under-provision of public goods (due to externalities or spillovers) or private goods (due to monopolistic tendencies in some markets). Utility regulation is largely concerned with the latter problem.

This article does not attempt to define Craven’s ‘functioning society’ but suffice to say it consists of communities and these in turn consist of people and place—that is, utility (preferences and behaviours) and capital (physical, human and natural).

Designing efficient and effective regulatory interventions requires knowledge of all of these variables. Gathering this information entails diminishing marginal returns on effort. As a result, regulators will only gather as much information as is sufficient to construct an ‘image’ of the sector and people they are required to regulate. Gifford (2003) refers to this as regulatory impressionism.

Assumed sector-images are constructed from average, discoverable producer (and market) attributes. The sector-images are designed to readily plug into regulatory decision-making models. Consequently, vested interests are incentivised greatly to influence (‘capture’) the regulator’s information set. Successfully shifting the sector-image by even a small margin can deliver potentially enormous windfalls.

Similarly, regulators must deal with people-images rather than people. A local regulator will leave some human foibles intact when constructing its people-image, known as ‘customers’. A regulator with a broader remit cannot afford this indulgence and so strips customers of almost all their human traits in order to create neatly defined ‘consumers’. An even more distant regulator must take the final step and remove all earthly vestiges from its people-image in order to create ‘representative economic agents’ – abstract beings who require nothing more than price signals to navigate their way through life (or rather, life-image).

This does not diminish the role of economic regulators, it merely highlights their limitations. Resource constraints and diminishing returns on information gathering dictate that as the regulator’s population of interests expands to cover more people and places, its assumed sector- and people-images become less representative of reality. This inescapable reductive process means that as a regulator’s responsibilities broaden, more people will be disenfranchised by its assumptions. There are only certain circumstances where this will not hold true. Larger (read: national) regulators will only be appropriate where either: local characteristics, priorities, conditions and histories do not matter; or they are homogenously distributed across the country.

But are the residents of Richmond, Richmond, Richmond and Richmond sufficiently indistinguishable? They probably don’t think so. In which case, the social optimality of a national regulatory arrangement needs to be tested and scrutinised publicly. Too often the benefit is merely asserted.

A corollary of this argument pertains to innovation and dynamic efficiency – not with respect to regulated

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8 That is, Richmond (NSW), Richmond (Vic), Richmond (Qld), Richmond (SA) and Richmond (Tas)
industries, but rather, among the regulators themselves. No doubt the ESCV, the IPART, the QCA, the ERA, the ESCOSA, the OTTER, the ICRC, the UCNT, the AER and the ACCC, each believes that Shakespeare had it in mind when he (almost) penned: 

...How noble in reason. How infinite in faculty. In form and moving how express and admirable. In action, how like an angel. In apprehension, how like a god. The beauty of the world, the paragon of regulators.

Alas, they can’t all be right – at least, not all of the time. But provided that it is true some of the time, then positive spill-overs among regulators may exist and these can benefit the national economy.

If regulators are free and motivated to learn from each others’ successes and failures, then that can only be welfare enhancing. Whereas success is rewarded by profit in the private sector, amongst regulators, success is rewarded by recognition and emulation. Regulators are as competitive as the markets of which they dream. The potential benefits arising from competition amongst economic regulators gets negligible recognition in public debates regarding federal regulatory arrangements.

It is somewhat ironic that national competition policies that do not tolerate monopolies in the operation of product markets, so readily accept the centralisation (and monopolisation) of economic regulation.

It is certainly true that regulators have particular characteristics that are akin to a natural monopoly and that such a feature favours the centralisation of regulatory powers. This may explain the establishment of the Australian Energy Regulator (AER) or the potential expansion of the ACCC into areas such as the regulation of rural water charges (until now a State responsibility).

It does, however, leave one to question: who is ‘regulating’ these monopoly-like (national) regulators? By-and-large, the statutory independence of such regulators suggests that they are trusted to regulate themselves. (Some, but not all, decisions can be appealed, but this is often costly and time consuming.)

The notion of self-regulating, monopoly-like regulators certainly challenges the mind.

But perhaps it is to narrow to think of the ‘market for regulators’ as a natural monopoly. Another market model that is rarely discussed, may provide greater insights. In monopolistic competition there are no monopoly rents yet price exceeds marginal cost even in equilibrium (Chamberlin 1933). This outcome reflects society’s desire for freedom of choice and product differentiation. Variety is welfare maximising.

As with product variety, it is worth considering whether the welfare of society can be enhanced by regulatory variety. Unlike product variety, regulatory variety cannot be viewed at a single point-in-time and point-in-space. Regulatory variety only makes sense when considered as a marketplace for ideas. Ideas are not bound by time or place. Ideas whose age is measured in millennia can still be relevant today. Ideas developed in one Richmond may benefit residents of another Richmond.

If we think of society as ‘buying’ a variety of regulatory ideas from regulators, then an exogenously imposed monopoly-like regulator implementing uniform national regulations may have adverse consequences for the welfare of society. Fewer new ideas will be generated. The regulatory learning process will be slower. Bad regulation will be harder to dislodge. Much social welfare will be at the mercy of just one decision-maker.

There are alternatives to national regulatory uniformity. Tanner (2008) cedes only minimally with his formulation of regulate nationally but enforce locally. Brumby (2008) supports a devolved model of regulatory harmonisation whereby each State complies with a common set of rules agreed by all jurisdictions. In other cases, all that may be required is regulatory ‘interoperability’ whereby operating in one jurisdiction would not create an unreasonable barrier to operating in another jurisdiction. Rules would continue to be set locally but based on common definitions and information standards that would be set nationally.

In a healthy federal system, rigorous and transparent tests would be applied to determine the optimal regulatory arrangement. Whether uniformity, harmonisation or interoperability is the preferred arrangement, should be a function of the market failure being addressed.

The design of these tests will need to be carefully considered to avoid the true ‘tyranny of incrementalism’ bedevilling Australian federalism. Tests supporting

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9 Essential Services Commission of Victoria, Independent Pricing and Regulatory Tribunal (New South Wales), Queensland Competition Authority, Economic Regulation Authority (Western Australia), Essential Services Commission of South Australia, Office of the Tasmanian Energy Regulator, Independent Competition and Regulatory Commission (Australi an Capital Territory), Utilities Commission of the Northern Territory, Australian Energy Regulator (National) and Australian Competition and Consumer Commission (Commonwealth)

10 Prime Minister Howard (2007a) used the term ‘tyranny of incrementalism’ in his Australia Day address in reference to
incremental decisions about the division of regulatory powers are likely to suffer from small sample bias. That is, the economy-wide, inter-temporal benefits of regulatory variety are likely to be truncated at zero. If this bias is left uncorrected, then the drift to centralisation will continue unabated.

Two recent studies have at least attempted to look at the economy-wide implications of federalism for Australian prosperity.

First, a report by Access Economics for the Business Council of Australia (2006) focussed on, what it termed as, the costs of the ‘mess’ created by ‘flawed federalism’. Not surprisingly then, the only benefits in the analysis were potentially lower costs arising from a streamlining of federal arrangements. Access Economics estimated the costs of federalism in 2004-05 at $8.9 billion or $450 for every Australian.

Second, Twomey and Withers (2007) avoided identification and measurement problems associated with a cost-benefit analysis by looking only at overall economic performance. They found that: (i) $4,507 of per capita GDP in 2006 could be attributed to Australia’s federal structures; and (ii) prosperity could be increased by $4,188 per capita if Australia were to reform its federal fiscal arrangements to align with the average degree of decentralisation of all OECD federations.

It would seem that, at least for now, the debate between federalism and centralisation defies comprehensive quantitative analysis. Case studies, such as the one provided in the next section, provide an alternative mechanism for assessing the issues.

IV. Once more unto the breach, dear friend, once more

As the Prime Minister rose to deliver his 2007 Australia Day address in the Great Hall of Parliament House, the combined infantry and artillery forces of centralism were already fanning out from Capital Hill. The annexation of the Murray Darling Basin was underway.

The invading forces encountered negligible resistance from South Australia. New South Wales and the Australian Capital Territory capitulated within days and Queensland’s opposition was soon overcome. In the south, the advance guard reached the headworks of the Goulburn irrigation system. Then Victoria launched its counter-offensive.

Hopelessly outgunned by the Commonwealth’s panoply of constitutional and financial threats, the Victorian Government mounted its insurgency in the courts of robust ideas and public debate.12

With the hoped for blitzkrieg all but stymied, a war of attrition ensued. The truce declared after the change of federal government in November, saw the troops replaced by the peace-keeping forces of cooperative federalism.

The Murray-Darling Basin episode provides an intriguing case study that further highlights the economic principles that ought to be applied when considering the future of Australian federalism. Years of drought have revealed long-standing market and regulatory failures, which in times of plenty were of little public concern. Each State has its own record in addressing some of these failures – some successfully, others less so. The drought has also highlighted beyond denial that some failures extended beyond any one State’s capacity to address. A regulatory free-rider problem has meant that too much water has been diverted and too many extraction rights have been issued by each State. The other failure is institutional.

The Australian Constitution, created a stand-alone Commonwealth that lay beyond the former colonies. The Constitution defined the role of the new federal polity in a limited way and maintained the constitutional sovereignty of the States. But the Constitution could not provide a means for enforceable cooperation among those States. This constitutional shortcoming became manifest in the consensus-based decision making processes of the now defunct Murray Darling Basin Commission.

Whether this feature of jurisdictional sovereignty can be overcome – or whether it is even desirable to try – is a vexed issue. However, there can be no doubt that this coordination failure created a breach in the management of the Murray Darling Basin. The Commonwealth Government, for a host of reasons, chose to step into the breach. At first, it did so tentatively, but not for long.

In 2002, the Prime Minister (Howard 2002) merely noted the importance of a nationally consistent approach to water property rights as ‘[this was] fundamental to delivering the best outcome for efficient and sustainable water use’. The National Water Initiative adopted by CoAG in 2004 inter alia reflected

11 From William Shakespeare (1564 - 1616), King Henry V, Act 3 Scene 1

these concerns and, in part, sought to address some of the coordination failures plaguing the Murray Darling Basin.

By July 2006, the Prime Minister was still extolling the need for collaboration, but he was also warning ominously that, ‘the Commonwealth has a particular duty to put the national interest first’. In hindsight, this appeal to nationalism can be seen as a portent of things to come.

Six months later and without prior detailed analysis or consultation (at least not with the relevant State governments), the Prime Minister announced a federal takeover of the Murray Darling Basin (Howard 2007a). The National Plan for Water Security foresaw the Commonwealth assuming complete control over the Basin’s water management. The plan demanded an absolute referral of powers from the relevant States and an effective veto over many other State government functions in the Basin. The Plan also included a conditional $10 billion inducement in expectation that the aphorism about Premiers and pots of money would hold true.

This attempted constitutional ‘smash-and-grab’ remains one of the most extraordinary episodes in the history of the Australian federation, the Murray Darling Basin and water policy more broadly. Much has happened since January 2007 but the lessons of that attempted intervention ought to be heeded.

As noted in section II, one of the devices built into the Constitution to prevent the abuse of power is the aggregation of countervailing responsibilities. This device is germane to constitutional responsibility for water management. The water resource is dynamically integrated with the surrounding natural environment and, indeed, the built environment.

Water management is land management. The two are non-separable – whether it is in terms of managing the public estate (including catchments, rivers and floodplains, national parks and state forests); or whether it is in terms of private land use and the role of governments in upholding private property rights through institutions such as the legal system, the statutory planning processes, or investment in community and economic infrastructure (such as farms and factories, houses and sports grounds, pipes and roads).

Land is where economic value is created and communities exist. Land is ‘place’ and ‘place’ is where people live and work, earn a living and invest their savings, share their lives and bury their dead. ‘Place’ is that corner of the world that becomes part of our own identities. Water management, policy and regulation, cannot be excised neatly from all of these considerations. If the water resource is mismanaged, it has consequences for ‘place’ and therefore for people.

It seems that the authors of the Australian Constitution understood this link between water, place and people. They embedded responsibility for water resources with the States rather than a distant federal government. They aggregated all the powers over ‘place’ and left them with the State governments. If State governments mismanaged the water resource, then there would be self-correcting mechanisms in terms of the internalised economic, environmental and political consequences. Of course, these self-correcting mechanisms failed to account for externalities that lay beyond jurisdictional borders.

National leaders are wont to remind us, rivers do not respect state borders. But it is a fallacy in logic to extend this political catchphrase to the conclusion that only a national approach, under the full control and aegis of the federal government and its instrumentalities, can correct for the shortcomings of State regulation.

For any economist, the role for a federal intervention in water policy should have been clear from the outset – address only those externalities arising from State-level policy but lying beyond an individual State’s jurisdiction. Externalities that lie within a State are the responsibility of that State’s government. If it fails to address the problem and worse yet, if its policies exacerbate the externality or market failure, then that is a matter between the government, the parliament and the voters of that State.

These lessons need to be remembered in the context of urban water reform. Despite there being no obvious cross-border externality with which to contend, the Federal Government, and its agencies, appear to have a continuing desire to enter this policy domain. If they succeed then one day, maybe ten, maybe twenty years from now, we will look at the urban water sector and wonder how on earth it became such a tangle of governance, ownership, regulation and funding arrangements.

Will the urban water sector or the Murray Darling Basin of 2024 come to resemble the health sector of today – a case of ‘postmodern federalism’ in which arrangements lack a clear central hierarchy and organizing principle; the embodiment of complexity, contradiction and ambiguity.

The water sector will only avoid this governance nightmare if there is a clear ex ante understanding and agreement about the role of governments – about the role of intervention in the market; about the role of regulation; about the division of powers.
V: Conclusion

It is as pointless to argue that the Commonwealth should retreat to the constitutional armistice lines of 1901, as it is to countenance the view that States are merely artefacts of history. If either case is to be true, then let the people decide.

Similarly, spruiking for ‘States’ rights’ has little real meaning. States, like the Commonwealth, as sovereign centres of government under the Australian Constitution do not have rights per se. They are granted powers to make and enforce laws. As law-makers they have obligations, not rights. Governments must be allowed to fulfil these obligations efficiently and without fetter.

Perhaps the only absolute truth in the entire debate is that community, economic and environmental priorities will change over time. The processes by which federalism adapts to these pressures must be robust and transparent. Simplistically focussing on the incremental costs and benefits of change at the margin may not result in a dynamically consistent outcome.

For now, the clarion call for cooperative federalism has been heard by all. This is to be welcomed. But are the seeds of future blame shifting, political point scoring and buck-passing lying dormant just below the surface, ready to germinate at the first sign of political tension between the different levels of government?

Will the structures established for cooperative federalism withstand political impatience and electoral impetuosity? The National Water Commission has already fallen short of expectations. Will the CoAG Reform Council hold greater sway over the Commonwealth than did the National Competition Council (when enforcing National Competition Policy)? The Murray Darling Basin Authority and the Australian Energy Regulator must prove that they can satisfy the requirements of people and place; and not just the needs of puddles and pylons.

The States must meet their commitments under cooperative federalism. Urgency must be given to fulfilling the responsibilities that they have accepted. As French (2008) has noted, ‘If the States are not perceived by electors as adequately discharging their constitutional responsibilities then such perceptions will feed into the legitimisation of national control.’

On the Commonwealth side, there must be acceptance that State-based outcomes will be scattered widely across a distribution curve. Some outcomes will be praiseworthy, others not. Failure may be undesirable, but it must be forgivable. Failures by some cannot be used as a trigger to punish success by others. The only sin beyond redemption should be the failure to learn from failure (by oneself or others).

Overseeing this cooperative venture will be the Council of Australian Governments (CoAG), which the Prime Minister (Rudd 2009) has described as the ‘workhorse for our nation’s future’. But Banks (2009) sounds a warning regarding ‘...the punishing dictates of the quarterly cycle of meetings. The seeming imperative for bureaucrats around the country to be constantly preparing for these meetings appears to be displacing some of the work that should be done to inform decisions.’

In the meantime, the constitutional equivalent of the Manhattan Project is probably already underway deep beneath National Circuit in Canberra. The search for a constitutional doomsday device that that will make the nuclear winter of the High Court’s Work Choices decision look like a mere cool change. The greatest danger for federalism will not be the discovery of a doomsday device, but that once discovered, the temptation to use it will be too great.

At that stage, there will only be one-line of defence against post-apocalyptic federalism or apocalyptic post-federalism. That ninety eight per cent of the population who continue to reside in the States will need to stand as human shields against the final act of centralisation.

Economic (and other) regulators may turn out to be the canaries in the coal mine of federalism. But they can also choose to be informed and independent commentators who can bring their well honed tools and considerable skills to these debates.

As the regulators of utilities, we are ever-vigilant to the dangers of stranded assets. There may be no asset in greater need of our attention than the one we call the Australian federation.

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13 See Withers and Twomey (2007)


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Critical Issues in Regulation – From the Journals


This paper conducts a survey of empirical studies assessing the efficiency and productivity performance of the port industry – a relatively new but increasingly important field due to growing interest in developing informative tools for business or policy decision-making. This paper reviews a number of port studies, published between 1993 and 2008, which use frontier analysis techniques to measure total factor productivity change and the relationship with efficiency, scale and technological change.

The majority of the empirical studies use panel data for ports from a single country (e.g. Spain) or multiple countries. Also examined in the survey are some other aspects of these studies, broadly classified into three categories: methodologies, objectives and results.

On the methodology side, the empirical studies are summarised in terms of port activities analysed, methodology, and variables modelled. Given the multi-output nature of port activity, it is important to ensure the homogeneity of ports under study. The activities most analysed are the provision of infrastructure services by the port authorities and the stevedoring operations by terminal operators. Two main approaches to frontier analysis are adopted: parametric approach (typically using stochastic frontier method or, more recently, multi-output distance function methods) and non-parametric approaches (typically using Data Envelopment Analysis method). Although there is a lack of consensus about the method which better represents the port technology, the choice is anyway often limited by data availability and reliability. Similarly, the great variety in specifications of empirical models (particularly the treatment of capital inputs) can be attributed to the data constraints imposed on the input and output data, as well as other variables used.

The survey finds that empirical studies have diverse research objectives, ranging from establishing the impact of ownership and management on port performance, to ranking ports and comparing the evolution of efficiency performance of ports under either regulatory or industrial reforms.

The survey discusses the empirical evidence arising from these studies, focusing on the relevance of the many factors that may affect efficiency and productivity performance. These include:

- Port ownership: the results are inconclusive about the impact of private entities’ efficiency relative to their public counterparts.
- Port size: the results are inconclusive in terms of the presence of economies/diseconomies of scale.
- Port reform: there is supporting evidence to suggest that regulatory changes towards greater competition can improve port performance.

In addition, the applied literature finds that port performance in terms of efficiency, technology and overall productivity, has generally improved over time. However, the authors of this paper specifically note the common data issues confronting empirical productivity studies, which would otherwise provide useful inputs for regulatory decisions or public policies in many areas. In relation to the port industry, they call for greater efforts from the regulators to collect the necessary data for the purpose of efficiency and productivity measurement.


In this paper John Vickers discusses the relationship between the operation of competition law and regulation in requiring firms to make inputs available to their competing rivals. Vickers suggests that one of the most controversial questions in current competition policy is when, if ever, should competition law require a firm with market power to share its property (including intellectual property) with its rivals. Although not attempting a comprehensive answer, his discussion outlines the key economic issues surrounding the desirability or otherwise of required sharing of property, which is equivalent to access regulation.

Vickers’s starting point is to contrast the approach of regulators and courts between US and European jurisdictions. In both places action has been taken against dominant companies that refuse to supply a good or service that might be necessary for effective competition with the firm’s downstream or affiliated operations. In a 2004 case against Verizon, the US Supreme Court suggested that investment incentives would be lessened by compelling firms to share their property. The case concerned whether or not it was a
violation of antitrust law for the vertically integrated dominant firm with wholesale market power to provide inputs to a rival on terms such that there was a price squeeze between the firm’s retail and wholesale prices. However Verizon was already subject to regulation requiring it to provide wholesale access, which Vickers suggests the court found did not, therefore, also give rise to an antitrust duty to aid rivals. The court cautioned that such a wider antitrust duty would be more widely detrimental to incentives for investment.

European courts and regulators, on the other hand, have tended to find that competition law enforcement might instead be complementary to regulation. Vickers refers to the recent Deutsche Telekom (DT) case brought by the European Commission in which DT was found to have brought about a margin squeeze that would in principle hinder competition in downstream markets. More recently, a case against Microsoft in the EU indicated that firms not already subject to regulation could also be found in breach of competition law. The technology firm was found to have abused its dominant position in the worldwide market for PC operating systems by refusing to supply interoperability information to rivals in the market for workgroup server operating systems. Other cases in Europe had also previously established that a dominant firm’s refusal to share intellectual property with rivals was a violation of EC competition law.

Using a simple model of price squeeze, Vickers illustrates how antitrust enforcement has generally been more concerned with inefficient exclusion, than with the exploitation of consumers. Vickers argues this has been reflected in cases as far back as the (now famous) case against Telecom Corporation of New Zealand, in which on appeal to the Privy Council it was found that Telecom’s application of the Efficient Component Pricing Rule (ECPR) meant that it had not abused its dominant position. Vickers suggests that in answer to the criticism that the ECPR looks in monopoly profits, the case indicates that excessive profit was found to be a matter for regulation, and not antitrust enforcement.

Vickers argues that the focus of antitrust enforcement on competitive parity is thereby more likely to reflect dynamic concerns, particularly the incentives to invest. However he argues that little is known about the effects of antitrust policy on innovation. Vickers surveys key models of the impact of such policies on innovation; however the results vary substantially according to the type of innovation (and environment). Vickers suggests this indicates that caution is warranted in using competition law to mandate access (and low fees) particularly in relation to intellectual property.

Vickers concludes that the importation of ‘antitrust conservatism’ to Europe would be unwelcome wherever competition law has been well disciplined by economics. However he suggests that this has not always been the case. The fact that regulated dominant firms often have regulatory duties to supply wholesale services to rivals may give less reason to be concerned about using competition law to prevent single-firm anticompetitive behaviour (such as price squeeze). However, Vickers concludes that a comprehensive answer to whether enforced sharing should be a requirement that comes from competition law, should also examine the comparative institutional advantages among the potential choices of policy intervention. He suggests that such relative advantages might at least partially explain some of the difference in approach between Europe and the US. Paper


This paper examines lessons learned from the recent deregulation of telecommunications in the UK for electricity network regulation. This is done in light of the review of RPI–X being undertaken by the Ofgem.

The author examines the recent history of deregulation in telecommunications. The paper examines the unbundling of the Local Loop, the copper wires connecting the customer's premise to the exchange. Unbundling can allow voice and broadband services to be provided either together or individually. The paper highlights the creation of Openreach, a separate business operating within British Telecom at arm’s length from the parent, providing local access services. The author suggests the creation of Openreach has contributed to the decline in prices and an increase in investment in telecommunications services.

The author feels that doubts raised in the regulation of telecommunications include fundamental questions regarding the necessity of regulation. The author quotes a 2007 paper by Hausman and Sidak as raising a number of issues regarding regulation. Hausman and Sidak argue that, due to large fixed costs, having too many customers leave the network could result in network viability being threatened. Thus a small number of customers switching may be consistent with large amounts of competitive discipline on incumbent networks. Another argument
raised is that unbundling would actually hinder competing facility investment and delay facilities-based competition.

The author quotes a 1999 paper by Joskow and Noll regarding differences between telecommunications and electricity. Joskow and Noll state that electricity: doesn’t rely on facilities-based competition; is not switched; doesn’t possess sophisticated real-time metering; and there is little scope for technical advancement. The author suggests that local network costs are much lower in electricity than in telecommunications.

In light of the above considerations, the author feels that transaction costs need to be reduced in the electricity market as these prices constitute a barrier to entry. The author suggests nodal pricing is an essential part of any future pricing regime as it reflects the benefits and costs of new entries. Reconfiguration of the ownership for electricity companies like that of BT and Openreach could be beneficial, as the author contends that this has worked out well for communications. Paper


One of the features of electricity generation is the variable demand facing electricity suppliers. In particular, this article focuses on methods to control peak electricity demand and how to measure the effectiveness of these measures. This variability can be according to the time of the day, or it can be seasonal with peak demand usually occurring during the hottest days of the year. Because the electrical power system does have capacity limits, management of the power supply in wholesale markets during peak times is required.

Typically, management of the power supply over the entire consumption cycle involves the segregation of prices between peak and off-peak times. Another policy initiative designed to promote system efficiency is demand response. Demand response is a reduction in demand designed to reduce peak demand or avoid system emergencies. It is considered that demand response can be a more cost-effective alternative than the supply response of adding peaking generation in an effort to meet occasional demand spikes.

Demand response can be implemented in a variety of forms. One form is known as critical peak pricing (CPP) and the other is peak time rebate (PTR). CPP involves the setting of tariffs at above peak rates for those few critical days in summer when system capacity is stretched. PTR involves granting the customer a rebate for less consumption of power during these critical days.

One measure of assessing the effectiveness of demand response is the loss of load expectation (LOLE). LOLE measures the expected number of hours with loss of load within a year. For example, the often used ‘one day in 10 years’ criterion commonly cited as a planning objective implies a LOLE of about 2.4 hours per year.

A measure of marginal capacity that is identified in the article is the effective load carrying capacity (ELCC). ELCC is defined as the amount of new load that can be added to a system after each new, or extra, generation unit is added to the power system while keeping the same level of reliability as measured by LOLE. So, ELCC measures the capacity contribution of each extra unit to a power system. By measuring the ELCC of a demand response, the effectiveness of the response can be quantified. The empirical evidence from evaluating LOLE and ELCC for demand response has shown that demand response offers benefits by increasing system reliability and reducing capacity needs of the electric power system. These benefits however decrease substantially as the size of the programs grows relative to the system size.

One policy implication is that the observed decreasing returns to scale may have rather large impacts on overall program potential and its cost effectiveness.
International Round-Up of Regulatory Decisions

This section contains a sample of recent regulatory decisions in leading OECD countries and the European Union, with emphasis on energy, telecommunications, posts, water and wastewater, rail, airports and ports.

Canada: Deal Approved to Increase Competition into Gas Market
As part of a remedy to address competition concerns identified by the Canadian Competition Bureau arising from the merger of Suncor and Petro-Canada — an integrated energy company and an oil company respectively — on 27 August 2009, Suncor consented to divest some of its terminal storage and distribution capacity available to a third party, Ultramar Ltd. Media Release

Europe: European Council Adopts Third Legislative Package on Energy Reforms
The third package of European energy reforms was accepted by the European Parliament in April 2009. On 25 June 2009 the European Council (EC) adopted the package.

The package adopted by the EC consists of:
- A Regulation establishing the EU Agency for the cooperation of National Energy Regulators
- An Electricity Regulation replacing Regulation (EC) No. 1228/2003

The Directives and Regulations were published in the Official Journal of the EU on 14 August 2009 and enter into force 20 days after their publication. Member States have 18 months from the date of entry into force in which to transpose most of the new rules into national law. Member States have 30 months to transpose the unbundling rules. Press Release

France: CRE Releases Second Quarter 2009 Electricity and Gas Observatory
The Commission de Régulation de l’Énergie (CRE) released the Electricity and Gas Market Observatory for the second quarter 2009. The purpose of the Observatory is to provide the general public with indicators for monitoring market deregulation. It covers both the wholesale and retail electricity and gas markets in Metropolitan France. Link

France: CRE Publishes Deliberation on Access to Gas Transmission Networks and Framework for Gas Interconnection with Spain
Since 1 January 2009, access to gas transmission in France has been organised into three zones administered by two transmission system operators. Although an improvement on previous arrangements, some shippers’ access to the south of France remains restricted and there are difficulties in defining the contractual framework for interconnecting the French network with Spain. Following consultation in May 2009, the CRE published, on 2 July 2009, the guidance it would provide to the Economics and Energy Ministers regarding these issues. Guidance

Germany: FNA Issues Additional Regulatory Order on IP Bitstream Access
The Federal Network Agency (FNA) issued a press release on 4 June 2009, stating it had notified Deutsche Telekom AG (DTAG) of a regulatory order on IP bitstream access which re-imposes the obligation to submit rates for approval on the basis of the efficient costs of providing the service. The regulatory order was necessary following the decision by the Federal Administrative Court on 28 January 2009 which repealed the requirement for approval of rates. The ruling will apply until a follow-up order is issued on the basis of a new market definition and market analysis. Press Release

Germany: FNA Specifies Rates for Access to Master Street Cabinets
On 15 June 2009 the FNA determined the rates that may be charged by Deutsche Telekom AG (DTAG) for competitors’ access to the local loop at master street cabinets. This followed a ruling in March 2009 that DTAG would be required to offer access to those cabinets. That decision was taken to facilitate the rollout of high-speed Internet access in rural areas not yet or only inadequately covered. Press Release

Germany: Federal Network Agency Announces Draft Regulations for Accessing Metering Services
On 21 July 2009 the FNA announced draft regulations that provide for national, uniform third-
party non-discriminatory access to metering services in the electricity and gas markets. The FNA also announced draft regulations for the standardised collection and transmission of meter readings. Consultation on the draft regulations closed on 17 August 2009. Press Release

Germany: Report Highlights Market Problems

On 4 August 2009 the German Monopolies Commission published a special report on Germany’s power and gas markets, highlighting a number of key problems. The report found that, although the markets have been liberalised for 11 years, competition in the markets continues to be negatively affected by ownership concentration, fragmented market areas and insufficient capacity management on the grid. The FNA suggested a number of remedies, including the merging of market areas and the expansion of the capacity of cross-border electricity interconnectors. Link (In German)

Germany: More Collaborative Market Areas Formed

See Notes on Interesting Decisions

Germany: FNA Publishes Data on Renewable Energy Sources

On 9 September 2009 the FNA published ‘The Statistical Report on the Final Annual Account under the EEG for 2007’. The report provides the main results of a survey carried out by the FNA on the nationwide equalisation scheme provided for in the Renewable Energy Sources Act (German abbreviation EEG). The objective of the EEG is to promote electricity production from wind power, solar radiation, biomass, geothermal power and hydropower, as well as mine gas. The core element of the legislation is the duty of grid operators to give priority to electricity from renewable energy sources, and to pay for it according to tariffs which are fixed for 20 years. These tariffs are based on the ‘shared burden principle’ whereby the costs of expanding renewable energy are apportioned to all grid system operators and spread across all electricity customers. Under the EEG, the FNA is responsible for monitoring the nationwide equalisation scheme including the quantity of energy and tariffs paid under the EEG by distribution system operators, transmission system operators and suppliers. Report (in German), Press Release

Ireland: ComReg Publishes Discussion Document on Next Generation Broadband

The Commission for Communications Regulation (ComReg) published a discussion document on 9 July 2009 that considers the potential for development of a Next Generation Broadband (NGB) service in Ireland. The document discussed the range of policy, technical and regulatory issues associated with a timely and efficient move towards the increased availability of NGB services. The period for submissions closed on 21 September 2009. Discussion Document

Ireland: ComReg Makes Final Decision on Rental Price for Shared Access to the Unbundled Local Loop

On 18 August 2009, the ComReg published its final decision on the appropriate monthly rental price for line sharing (LS). The final decision changes the cost allocation methodology initially proposed in its December 2008 consultation document, so that only costs which are incremental to the provision of LS should be recovered in the price of LS. Decision

Ireland: ComReg Publishes Quarterly Key Data Reports for 2009

The ComReg released the Quarterly Key Data Report for the first quarter on 17 June 2009, and for the second quarter of 2009 on 10 September 2009. The reports contain a range of data relating to the fixed, mobile and broadband communications sectors in Ireland, including revenues and penetration rates. Report(Q1), Report (Q2)

Ireland: ComReg Publishes Report on Implementation of EC Roaming Regulation in Ireland

The EC Roaming Regulation ((EC) No 717/2007) came into effect on 29 June 2007. The Regulation placed a price cap on wholesale and retail voice calls made while roaming in the European Union. It also put in place a number of transparency measures helping to ensure that consumers are better informed regarding mobile roaming prices. The Roaming Regulation required National Regulatory Authorities (NRAs) to collect data for monitoring purposes with the European Regulators Group (ERG) coordinating the actions of individual NRAs and publishing its report on a six monthly basis. The ERG published its fourth report on International roaming on 22 July 2009. As the Irish NRA, the ComReg also published on 24 August 2009 its fourth report on Irish and EU aggregated data for the period 1 October 2008 to 31 March 2009. The report also
UK: Ofcom Varies BT’s Undertaking
Following consultation on, and some modifications to, the initial proposals, the UK Office of Communications (Ofcom) announced on 11 June 2009 that it would agree to vary BT’s Undertakings in relation to investment in Fibre-to-the-Cabinet (FTTC) technology. The variation allows Openreach to control and operate equipment necessary to providing super fast broadband services using FTTC. Previously, Openreach was not allowed to control and operate such equipment. Link

UK: Ofcom Sets Charges for Wholesale Leased Business Lines
On 2 July 2009, the Ofcom released a Statement that set out the detailed design and methodology of the charge controls for wholesale traditional and alternative interface leased lines services supplied by BT in markets which it was found to have Significant Market Power (SMP) in the Business Connectivity Market Review (BCMCR) Statement. The Ofcom attempted to ensure that the charge controls provide appropriate incentives for efficient investment and for efficient migration from old to new products. RPI–X controls will be applied to most of these services, with price caps and sub price caps applied to six charge control baskets. The leased lines charge controls will apply for the period ending 30 September 2012. Kingston Communications (KCOM) was also found to have SMP in certain markets. However, Ofcom decided to accept a voluntary undertaking offered by KCOM to lower prices in those markets, rather than imposing price controls. Statement

UK: Ofcom Consults on Wholesale Access Prices for Openreach
Openreach is a division of British Telecom (BT) established in agreement with Ofcom to provide other operators equal access to BT’s own local networks. The current WLR charge ceilings were set in January 2006 and reflect the view at the time that there were separate markets for businesses and residential customers. In 2007, the Ofcom commenced a review of the WLR and also the local loop unbundling (LLU) charges under the Openreach Pricing Framework Review. The review concluded that it was appropriate to separate the determination of the LLU and WLR charges. The Ofcom published a consultation paper on 3 July 2009, setting out its view that regulation of WLR is still appropriate and should be continued. The Ofcom was of the opinion that there is now a single market for wholesale analogue exchange lines rather than separate markets for business and residential wholesale analogue exchange lines. The Ofcom therefore proposed to modify the structure of the charge controls to reflect this revised view of the market and the use of the regulated services. The proposed new controls would apply until March 2013. The consultation period closed on 14 August 2009. Link

UK: Ofcom Deregulates Retail Telecommunications Market
On 19 March 2009, the Ofcom published a consultation document setting out the initial findings of a review of the state of competition in the retail narrowband telephony markets, which covers analogue and digital (ISDN) telephone lines, and business and consumer calls. The Ofcom completed the review and published a Statement of its findings on 15 September 2009. The Ofcom found that most of the UK retail markets are now effectively competitive. Specifically, BT no longer has significant market power (SMP) in the provision of retail fixed narrowband analogue access and retail calls markets, in either the residential or business sectors. Thus retail price controls, which were lifted in 2006, are not necessary. Statement of Findings

UK: Ofcom Concludes Review of BT’s Network Charge Controls
On 15 September 2009 the Ofcom published a Statement that contains the conclusions of its Review of Network Charge Controls (NCC). The Ofcom found that BT has significant market power in the markets for wholesale fixed call origination and geographic call termination and that new NCCs should be applied to these services when the existing controls expire at the end of September 2009. Statement

UK: Ofcom Publishes Consultation on Next Generation Networks
The Ofcom considers that the adoption of Next Generation Network (NGN) technology has the
potential to bring significant benefits to consumers and to alter the prevailing model of competition in the telecommunications sector. However, rather than displacing existing technologies, NGN technology is being adopted alongside fixed and mobile access network upgrades, and alongside equally important developments in other sectors, particularly in information technology. It is within this context that the Ofcom commenced a consultation on its response to recent NGN developments and its views as to how consumers should be protected during the migration to NGNs. On 31 July 2009 the Ofcom published a consultation document containing its views of some of the possible longer term implications for regulation of a widespread adoption of NGN technology. The consultation period closed on 24 September 2009.

**UK: Ofcom Issues Revised Version of Gas and Electricity Connections Industry Review 2007-08**

On 20 July 2009 the UK Office of the Gas and Electricity Markets (Ofgem) issued a revised version of the 2007-08 Connections Industry Review originally published on 16 October 2008. The publication also contains a corrigenda that details all revisions.

**UK: Ofcom Releases Quarterly Price Report**

In August 2009 the Ofcom released the third edition of the Quarterly Wholesale/Retail Price Report. The purpose of the report is to provide information on the relationship between wholesale energy costs and retail energy prices.

**UK: Energy Supply Probe**

In February 2008, Ofgem launched the Energy Supply Probe, a study of the state of the retail energy supply markets in Great Britain. An Initial Findings Report was published in October 2008 and a range of remedies were proposed in April 2009 for consultation. In the light of responses to consultation, the Ofgem announced on 7 August 2009 its decision to proceed to statutory consultation on a package of licence modifications to promote competition and protect consumers in the retail energy supply market.

**UK: Electricity Distribution Price Control Review – Initial Proposals**

The Ofgem regulates the 14 UK monopoly region DNOs by setting a price control every five years that sets the maximum revenues each DNO can collect from customers. The current price control expires on 31 March 2010. On 3 August 2009 the Ofgem published a consultation document setting out its initial proposals for the revenues the companies should be allowed to earn in the next five years. If the companies accept the proposals they will come into force in April 2010.

**UK: Ofcom Issues Letter on Distribution Charging Methodology**

The Ofcom released on 4 August 2009 a letter which flags that the combination of the outcomes of the new electricity distribution price control review and the proposed new charging arrangements are likely to cause significant rises in the level of charges faced by different customer groups from 1 April 2010.

**UK: Government Releases Low Carbon Transition Plan**

On 15 July 2009 the UK Government released The UK Low Carbon Transition Plan that details how the UK will become a low-carbon economy. The Transition Plan keeps the overall impact of carbon reduction on consumers to a minimum by holding average energy bills at current real levels until 2015. By 2020, the impact of all climate change policies will add, on average, an additional £92 (or 8 per cent) to household bills compared with current levels. The Plan includes greater powers for the Ofgem to protect consumers and, following new legislation, new resources for discounts off the bills of some of the most vulnerable households. The Government intends to publish a new Social and Environmental Guidance for the Ofgem. Finally, to make it easier for local authorities, businesses or community groups to generate electricity at community, scale the Government has worked with the Ofgem to introduce new licensing arrangements that make it easier for community energy schemes to interact with the wider electricity system.

**UK: Ofgem Restructured to Meet Low Carbon Challenge**

See Notes on Interesting Decisions

**UK: Ofgem Releases Review of the First Year of the Carbon Emissions Reduction Target**

The UK’s Carbon Emissions Reduction Target 2008-2011 (CERT) requires certain gas and electricity suppliers to meet a carbon emissions reduction target between 1 April 2008 and 31 March 2011. At least 40 per cent of the target has to be met in relation to certain low-income consumers or those over 70 years old (the Priority Group). The Ofgem administers the CERT program by determining the carbon emissions reduction obligation for each supplier and monitors...
compliance. It released a report on 1 August 2009 that sets out the suppliers’ performance during the first year of the CERT. The Ofgem found that by the end of the first year of the CERT, suppliers had delivered sufficient energy saving measures to meet around 50 per cent of the revised overall target of 185 million lifetime tonnes of carbon dioxide, with approximately 45 per cent of savings achieved in the Priority Group. Report

UK: Ofgem Releases Reports on Suppliers’ Social Obligations and Voluntary Social Programs
See Notes on Interesting Decisions

UK: Ofwat Publishes Findings on Cost Base Audits
As part of its review of water charges, the UK Water Regulator (Ofwat) commissioned Jacobs Engineering UK Ltd (Jacobs) to carry out a structured review of how each company had prepared its cost based submission to the Ofwat. Jacobs provided feedback and advice on whether there were any reasons why standard costs were not comparable between companies and if so, how these issues should be addressed. The audit report was published on 27 August 2009. Jacobs made a number of recommendations for the conduct of the next review, but concluded overall that the ‘Ofwat can be confident in the robustness and consistency of the cost base data and therefore its assessment of relative efficiency in this periodic review’. Audit Report

UK: Ofwat Advises UK Government on Threshold for Legal Separation of Water and Sewerage Businesses
See Notes on Interesting Decisions

UK: Ofwat and WWF Issue Joint Statement on Water Abstraction
In August 2009 the Ofwat and the World Wildlife Fund UK issued a joint statement, supporting effective measures for reform of water abstraction licences. Both organisations agreed that the current arrangements for abstraction licensing need reform. In order to achieve efficient and sustainable abstraction, it will be necessary to use a combination of market-based mechanisms and regulatory approaches, such as time-limiting. Statement

UK: ORR Publishes Review of Network Rail’s Performance
On 3 June 2009 the Office of Rail Regulation (ORR) published its National Rail review, which considers the performance of Network Rail and the industry in general over the whole of the last five year price control period, and its Network Rail monitor which covers performance over the past year to 31 March 2009. The ORR found that Network Rail succeeded in delivering its main output obligations set in the last price control. However on parts of the network its performance was unsatisfactory. The ORR asked Network Rail to produce by the middle of June 2009 a credible plan for improving performance or else risk breaching its licence. National Rail Review

UK: Competition Commission Publishes Appeal Decision on Sutton and East Surrey Water Charges
On 17 August 2009 the UK Competition Commission (UKCC) announced that it had rejected an appeal from Sutton and East Surrey Water (SES) against a pricing determination made by the Ofwat in December 2008. A non-confidential version of its findings, together with supporting appendices, was published on 4 September 2009. Final Determination

UK: Competition Commission Accepts Final Undertakings of Rolling Stock Leasing Market Investigation
The UKCC published its Rolling Stock Leasing report on 7 April 2009. The UKCC found that one of the features that adversely affected competition in the market was that train operating companies (TOCs) have limited incentives to negotiate with rolling stock leasing companies (ROSCOs) over lease rentals. One of the reasons was the non-discrimination requirements contained in the TOCs’ Codes of Practice. To remedy this, the UKCC required each of the ROSCOs to amend its Code of Practice to remove the non-discrimination requirement. On 10 July 2009 the UKCC published Notice of Acceptance of Final Undertakings from various parties in relation to their Code changes. Link

UK Government Responds to UKCC’s Rolling Stock Leasing Market Investigation – Threatens Price Controls
In July 2009 the UK Government released its response to recommendations made by the UKCC in its Rolling Stock Leasing Market Investigation as those recommendations impact in England and Wales. The Scottish Government will be responding separately to the recommendations that impact
specifically on Scotland. As part of the investigation, the UKCC was asked by the Department of Transport (DIT) to consider whether price controls were an appropriate way to address consumer detriment in the market. The UKCC determined that changes to franchise arrangements would be a better way to achieve that objective, but left it open to DIT to seek its own legislative powers to influence or control rentals. The Government's response indicates its concern that even if the UKCC’s proposals are implemented successfully it will take time for them to take effect. Thus the DIT will closely monitor the new arrangements and retain the option to seek new price control powers if these should prove necessary. Government Response

UK: Stay on Proposed Part-privatisation of Royal Mail

Following a review of the UK postal sector and Royal Mail, the UK Government introduced the Postal Services Bill 2009 to modernise Royal Mail and update the regulatory framework to ensure, among other things, the sustainability of the Royal Mail’s universal service obligations. Although it is Government policy for Royal Mail to be majority-owned by the government, the Bill provides for the sale of a minority share of Royal Mail to the private sector. On 1 July 2009, Lord Mandelson, the Secretary of State for Business, Innovation and Skill, made a statement to the House of Lords indicating that the second reading of the Bill will be delayed. Lord Mandelson told the House that ‘market conditions have made it impossible to conclude the process to identify a [private sector] partner on terms that we can be confident would secure value for the taxpayer. There is therefore no prospect in current circumstances of achieving the objectives of the Postal Services Bill. When market conditions change we will return to the issue.’ Link

US: FCC Clarifies Standards for Evidence of Competing Provider Effective Competition for Cable Service

On 18 August and 2 September 2008, the Federal Communications Commission (FCC) issued Public Notices concerning the evidence that cable operators are required to show when petitioning for findings of ‘competing provider’ effective competition. In order to show competing provider effective competition, the cable operator must show that the number of households subscribing to video programming, other than the largest video programming distributor, exceeds 15 per cent of households in the franchise area. A further Public Notice, issued on 18 June 2009, clarified that the FCC will consider filings by cable operators using Five-Digit, Nine-Digit, or other kinds of evidence. Evidence that is obviously inaccurate or results in highly questionable levels of subscription will be dismissed, regardless of format. Public Notice

US: FCC Releases Annual Telecommunications Industry Revenue Report

On 3 September 2009 the FCC released its annual report on telecommunications industry revenues for 2007. The report, titled Telecommunications Industry Revenues 2007, provides an overview of revenues in the US telecommunications industry and contributions to the universal service support mechanisms over the past decade. The report also explains significant shifts in the way universal service support is funded, reflecting the changing level of revenues reported by various sectors of the industry over the past decade. Report

US: FCC Releases Report on Local Telephone Competition

Twice a year, all incumbent local exchange carriers (incumbent LECs) and competitive local exchange carriers (CLECs) are required to report to the FCC basic information about their local telephone service, and all facilities-based mobile telephony providers are required to provide information about their subscribers. The FCC uses this information to prepare and report annually on summary statistics of local telephone service competition in the US. The latest summary statistics are contained in a report titled Local Telephone Competition: Status as of 30 June 2008, which was published in July 2009. Report


Under the Telecommunications Act 1996, the FCC is mandated to encourage deployment of advanced telecommunications capability in the United States on a reasonable and timely basis. To assist in its evaluation of such deployment, the FCC instituted a formal data collection program in 2000 to gather standardised information about subscription to high-speed services, including advanced services, from fixed-line telephone companies, cable system operators, terrestrial wireless service providers, satellite service providers, and any other facilities-based providers of advanced telecommunications capability. Findings from data collected over the year ending 30 June 2008 were published in July 2009 in a report titled High-Speed Services for Internet Access: Status as of 30 June 2008. Report

US: FCC Announces Wireless Inquires

See Notes on Interesting Decisions
US: FERC Releases Smart Grid Policy Statement and Interim Rate Policy

In March 2009, the Federal Energy Regulatory Commission (FERC) issued a Proposed Policy Statement and Action Plan to guide the development of key standards for smart grid devices and systems. Following consultation, the FERC released on 16 July 2009 the Smart Grid Policy Statement. This Statement provides guidance on the development of a smart grid for the US electricity transmission system, focusing on the development of key standards to achieve interoperability and functionality of smart grid systems and devices. In response to the need for urgent action on potential challenges to the bulk-power system, the Statement also provides additional guidance on standards to help to realise a smart grid. The FERC has also adopted an Interim Rate Policy until it adopts interoperability standards. This Policy is intended to encourage investment in smart grid systems. Policy Statement

US: FERC Reaffirms Need for Demand Response in Organised Electricity Markets

Organised electricity markets are those in which a Regional Transmission Operator (RTO) or Independent System Operator (ISO) operates a day-ahead and/or real-time energy market. In October 2008, the FERC issued a Final Rule (Order No 719) that introduced reforms to improve the operation of organised wholesale electricity markets and amended its regulations under the Federal Power Act in relation to: (1) demand response, including pricing during periods of operating reserve shortage; (2) long-term power contracting; (3) market-monitoring policies; and (4) the responsiveness of (RTOs) and (ISOs) to their customers and other stakeholders. An electric demand-response activity is an action taken to reduce electricity demand in response to price, monetary incentives or utility directives to maintain reliable service or avoid high electricity prices. Following requests for rehearing and clarification of aspects of Order 719, on 16 July 2009 the FERC reaffirmed that demand response directly affects rates in organised wholesale electricity markets and, therefore, removing barriers to demand response is consistent with its duty to ensure the sound operation of those markets. Under Order No 719-A, market operators may not accept bids that include aggregated demand response provided by customers of small utilities that distributed up to 4 million megawatt hours during the previous year, unless a small utility’s retail regulator (usually a state authority) authorises such aggregation. RTOs and ISOs may continue to accept bids from companies that aggregate demand response provided by customers of larger utilities, unless the relevant retail regulator prohibits those customers from participating in wholesale markets. News Release, Order No 719-A

US: Verizon Seeks to Avoid Increased Regulation

In July 2009 Verizon Wireless, the largest provider of wireless telecommunications in the United States, offered to allow other carriers to roam on its network for two years. The offer was made in a letter to the new chairman of the House Energy and Commerce Committee in response to Verizon’s perceptions that policy makers may be seeking more regulation of mobile communications companies. The FCC has yet to give its views on Verizon’s proposals but some users and consumer groups have suggested the offer is inadequate and regulation is required. News Report
Regulatory Decisions in Australia and New Zealand

New Zealand

Commerce Commission (NZCC) Finds Broadband Performance Continues to Improve

On 23 September 2009 the NZCC released its report on New Zealand broadband quality for the three months to June 2009. The report found a steady increase in the quality of broadband services provided by New Zealand's internet service providers (ISPs) over the period considered. Media Release

NZCC Reports to the Minister on Sprint's Compliance with TSO

Each year, Sprint International New Zealand Limited is required to provide the NZCC with information on its compliance with the Service Quality Measures in the Telecommunications Service Obligations (TSO) Deed for Telecommunications Relay Services (TRS). This Deed sets out the service quality requirements for the provision of the TSO relay services which enable hearing impaired telecommunications users to make relay calls. On 18 September 2009 the NZCC advised the Minister for Communications and Information Technology that it is satisfied that Sprint met one of the two applicable Service Quality Measures for the period 1 July 2008 to 30 June 2009. Media Release

NZCC Reports on Telecom’s TSO Compliance

The NZCC also advised the Minister on 18 September 2009 that Telecom complied with its TSO obligations for the 2008/09 financial year. The service quality measures applicable to Telecom include measures relating to line connect speed capacity for standard internet calls, unsuccessful residential call attempts and 111 (emergency) calls. Media Release

NZCC Holds Input Methodologies Conference

The NZCC held an input methodologies conference in Wellington from 15 to 18 September 2009. The conference was part of the NZCC’s consultation process on the implementation of the Part 4 requirements of the Commerce Act 1986. Media Release

NZCC Releases Draft Decisions Paper Relating to Electricity Distribution Businesses

On 8 September 2009 the NZCC released a draft decisions paper on the default price-quality paths to apply to electricity distribution businesses from 1 April 2010. This is the fourth paper released for consultation as part of a process to reset the default price-quality paths that currently apply to electricity distribution businesses under Part 4 of the Commerce Act 1986. Media Release

NZCC Opens Investigation into Telecom Wholesale Loyalty Offers

The NZCC announced on 31 August 2009 the launch of an investigation into an alleged breach of the Separation Undertakings by Telecom’s Wholesale business unit. This decision followed receipt of the Independent Oversight Group’s (IOG) findings that Telecom Wholesale’s loyalty offers constitute a breach of Telecom’s Undertakings. The NZCC expects to issue a decision by 9 October 2009 on whether or not any enforcement action is required. Media Release

NZCC to Defer Commencement of Mobile Roaming Investigation

The NZCC announced on 28 August 2009 that it will not commence an investigation into whether regulation of the national mobile roaming service should be extended to include price, until it has finalised its investigation into whether mobile termination access services (MTAS) should be subject to regulation. The NZCC expects to complete the mobile termination investigation by mid–December 2009. Media Release

NZCC Confirms Confidentiality Order

The NZCC confirmed on 13 August 2009 that protection for confidential information under a confidentiality order in relation to commercial interconnection agreements provided by telecommunications companies for the investigation into mobile termination rates will remain in place. In particular, the NZCC declined Vodafone’s request that the agreement between it and 2degrees be made public. The NZCC is also investigating a potential breach of the confidentiality order following the disclosure of details of the Vodafone and 2degrees agreement in a National Business Review article. Media Release
NZCC Releases Draft Guidelines for the Telecommunications Sector

On 31 July 2009 the NZCC released draft guidelines setting out the key factors that the NZCC takes into account in making regulatory decisions for the telecommunications sector. Submissions were due 18 September 2009. [Media Release]

NZCC Begins Consultation on Information Disclosure Regime

On 29 July 2009, the NZCC released a discussion document which forms the first step in a consultation process to develop information disclosure requirements for the suppliers of regulated electricity lines, gas pipelines and specified airport services. The Information Disclosure Discussion Paper sets out the NZCC’s preliminary views on its approach to information disclosure regulation under Part 4 of the Commerce Act 1986. [Media Release]

Australia

Government Announces Telecommunications Regulatory Reforms

On 15 September 2009 the Minister for Broadband, Communications and the Digital Economy, Senator Stephen Conroy, announced a legislative package of fundamental reforms to existing telecommunications regulations. The legislation will allow Telstra to voluntarily submit an enforceable undertaking to the Australian Competition and Consumer Commission (ACCC) to structurally separate. If Telstra chooses not to structurally separate, the legislation provides for the Government to impose a strong functional separation framework on Telstra. Telstra will be prevented from acquiring additional spectrum for advanced wireless broadband while it:

- remains vertically integrated;
- owns a hybrid fibre coaxial cable network; and
- maintains its interest in Foxtel.

The legislation will also reform the arrangements in Part XIB of the TPA so that the ACCC can address breaches of competition law and conduct damaging to the market. The ACCC will no longer have to consult with a party before issuing a competition notice; a process previously prone to delay and obstruction. [Media Release]

Australian Competition and Consumer Commission (ACCC)

Tribunal Grants Exemptions for Wholesale Voice Services

On 10 September 2009 the Australian Competition Tribunal confirmed there is a case for winding back regulated access to Telstra’s wholesale voice services in certain metropolitan and CBD areas, when and where competition has sufficiently developed. The Tribunal varied the exemption orders made by the ACCC in August and October 2008 in relation to Telstra’s supply of the local carriage service (LCS), wholesale line rental service (WLR) and PSTN originating access service. [Media Release]

ACCC Issues Position Paper on Water Trading Rules

On 10 September 2009, the ACCC issued a position paper inviting submissions on the development of water trading rules advice. Submissions are due on 23 October 2009. [Media Release]

ACCC Welcomes Third Party Access to Brisbane Oil Storage Facilities

Access to an important delivery and storage point for crude oil in Brisbane was announced on 7 September 2009 to have been opened to competition in a deal assisted by the ACCC. The access requirement was incorporated into a new lease agreement for the Lynton Tank 1020 storage facility near the Port of Brisbane. From 1 September 2009 the lessee must negotiate commercial terms with prospective users of the facility. [Media Release]

ACCC Issues Enforcement Guidelines for Water Market Rules and Water Charge Rules

On 31 August 2009 the ACCC issued guidelines outlining its approach to enforcing the Water Market Rules 2009 and Water Charge (Termination Fees) Rules 2009. The guidelines explain the processes and remedies available to the ACCC to enforce compliance. [Media Release]

Retail Gas Market Rules to Continue in SA & WA

The Retail Energy Market Company (REMCo) is required to publish rules that currently govern the conduct and operations of the retail gas markets in South Australia and Western Australia. On 28 August 2009 the ACCC announced it had granted authorisation to the REMCo arrangements for 10
years in Western Australia. In South Australia, the ACCC granted authorisation for 10 years or until the Australian Energy Market Operator takes over REMCo's operations (currently scheduled to take place on 1 October 2009). Media Release

ACCC Issues Draft Pricing Principles, Indicative Prices for Fixed Line Services
The ACCC issued on 21 August 2009 its draft pricing principles and indicative prices for six fixed line wholesale services for the next three years. The services are the unconditioned local loop service (ULLS); the line sharing service (LSS); the public switched telephone network originating access (PSTN OA) service; the public switched telephone network terminating access (PSTN TA) service; the local carriage service (LCS); and the wholesale line rental (WLR) service. The draft pricing principles propose that all six services will be priced on a cost basis. Media Release

Market Critical in Valuing Water
Commissioner Ed Willett, of the ACCC, told the Australian Economic Forum in Sydney on 20 August 2009 that a well-functioning water trading market has a critical role in revealing the true value of water, which is necessary to ensure that users such as irrigators innovate and improve productivity. He spoke after the release of the annual Water Report Card, by the Water Services Association of Australia, which said water prices were expected to double in all Australian capital cities over the next five years. Media Release

ACCC Seeks Comment on Proposed Increases in Postage Prices
On 20 August 2009 the ACCC released an issues paper seeking comment on Australia Post's proposal to increase prices across a number of its monopoly letter services. Australia Post lodged a draft notification with the ACCC on 24 July 2009 which proposes, among other things, an increase in the basic postage rate from 55 to 60 cents. Submissions closed on 18 September 2009. Media Release

ACCC Proposes Improvements for Grain Port Access Arrangements
On 6 August 2009 the ACCC issued draft decisions not to accept the access arrangements proposed by port operators CBH, ABB and Graincorp in their current form. The wheat industry is currently in transition after liberalisation, having moved from a single exporter of wheat to 23 accredited wheat exporters within 12 months. One of the requirements of liberalisation is that port operators CBH, ABB and Graincorp must have port access arrangements accepted by the ACCC. The draft decisions contain proposals for improvements. Media Release

ACCC Determines No Australia Post Cross-Subsidy
On 30 July 2009 the ACCC issued its fourth report assessing if Australia Post's services were being cross subsidised in the 2007-08 financial year. The ACCC's chairman, Graeme Samuel, said, 'Australia Post's logistics services continue to be cross-subsidised, and the source of that cross-subsidy appears to be Australia Post's other competitive services, rather than its monopoly services'. This report is consistent with findings of all previous years. Media Release

ACCC Confirms Five Year Extension for Key Telecommunications Declarations
The ACCC announced on 16 July 2009 that it will extend the declarations that enable Telstra's competitors to provide fixed voice and broadband services over Telstra's copper network for a further five years. Media Release

ACCC Provides Final Advice for Water Planning and Management Charge Rules
On 10 July 2009, the ACCC submitted its final advice on water planning and management charge rules to the Minister for Climate Change and Water. The ACCC provided draft Water Charge (Planning and Management Information) Rules with the advice. The proposed rules require state government departments and agencies to publish details of water planning and management charges. Media Release

ACCC Grants Interim Authorisation for the Phase-in of a Long Term Solution to Hunter Valley Coal Chain Constraints
The ACCC announced on 22 July 2009 that it would grant conditional interim authorisation to Port Waratah Coal Services, the Newcastle Coal Infrastructure Group and the Newcastle Port Corporation to begin the phased implementation of arrangements to provide a long term solution to continuing capacity constraints in the Hunter Valley coal chain. The interim authorisation was subsequently revoked on 1 September 2009 when one of the companies failed to meet a 31 August deadline to execute their Capacity Framework Documents. On 23 September 2009 the interim authorisation was reinstated after the parties executed the relevant documents. Media Release
Australian Energy Regulator (AER)

Proposed Amendments to the Service Target Performance Incentive Scheme
On 21 September 2009 the AER proposed amendments to its services target performance incentive scheme to apply to electricity distribution networks. The proposed amendments were designed to improve the clarity, effectiveness and operation of the scheme and to increase its flexibility, most notably with respect to determining the major event day boundary.

Energy Regulator Warns of Generator Market Power
There are worrying signs of market power in the electricity market, AER board member and ACCC Commissioner, Ed Willett, said in a speech on 8 September 2009. ‘With customers already facing increased prices it is particularly concerning, that generators are pushing up wholesale prices by using their market power and further increasing the cost to consumers,’ he told the energy 21 conference in Melbourne.

Regulatory Proposals for QLD and SA Electricity DNSPs
The AER published regulatory proposals received from Energex, Ergon Energy and ETSA Utilities in early July 2009. Energex and Ergon Energy operate electricity distribution networks in Queensland. ETSA Utilities operates an electricity distribution network in South Australia. On 17 July 2009 the AER also published its proposed negotiated distribution service criteria (NDSC) for each DNSP.

CitiPower’s Approach to Charge New Customers Capital Contribution for Upstream Network Augmentation
On 17 July 2009, the AER released a formal decision on CitiPower’s capital contribution charge policy for recovering future upstream network augmentation costs. This decision follows a draft decision on ‘CitiPower’s capital contribution charge for marginal cost of network reinforcement’ published by the Essential Services Commission of Victoria (ESCV) in December 2008.

AER Gas Market Weekly Reports
The AER launched a new weekly gas market report in July 2009. The report provides an overview of gas production and flow information in the key demand regions of southern and eastern Australia and covers pipeline and production facilities registered on the Bulletin Board. The report also provides a summary of activities in the Victorian Gas Market, including wholesale price trends. The first report covers the period 21-27 June 2009.

AER Makes Draft Determination on Victorian Smart Meter Costs and Charges
On 31 July 2009 the AER issued its draft determination on the Victorian distribution network service providers’ Advanced Metering Infrastructure (AMI or ‘smart meters’) budgets for 2009 to 2011 and metering charges for 2010 and 2011.

AER Institutes Proceedings against Queensland Generator Stanwell
On 28 July 2009, the AER instituted proceedings in the Federal Court, Brisbane, against Stanwell Corporation Limited (a Queensland Government owned electricity generator). The AER has alleged that Stanwell did not make several of its offers to generate electricity on 22 and 23 February 2008 in ‘good faith’ contrary to clause 3.8.22A of the National Electricity Rules.

Australian Energy Markets Commission (AEMC)

On 23 September 2009 the AEMC published and provided its final report to the MCE on the Review of National Framework for Electricity Distribution Network Planning and Expansion. The final report follows the release of a draft report on 7 July 2009 and the publication of slides and a transcript of the proceedings of a December 2008 public forum.

Commencement of Annual Market Performance Review
On 2 September 2009, the reliability panel gave notice that it had commenced its annual review of the performance of the National Electricity Market for the 2008-09 year. The review focuses on the performance of the market in terms of reliability of the power system and the power system security and reliability standards.

AEMC Publishes New Version of the National Electricity Rules
On 1 September 2009 the AEMC published a new version of the National Electricity Rules. The new version consolidated the National Electricity Amendment (Congestion Information Resource) Rule 2009 No. 16 and the National Electricity Amendment...
AEMC Publishes Documents from an Industry Forum on Generator Transmission Use of System Charges
The AEMC published, on 28 August 2009, an Agenda Paper and a summary of the issues raised from an Industry Forum held on 17 August 2009 in Sydney. The purpose of the Forum was to discuss the locational pricing issues raised in the 2nd Interim Report to the Review of Energy Market Frameworks in light of Climate Change Policies. The Final Report to the MCE is due on 30 September 2009.  

Review into the Use of Total Factor Productivity (TFP) for the Determination of Prices and Revenues
On 23 July 2009, the AEMC revised the time line for the TFP Review. The AEMC released its report 'Perspectives on the building block approach' on 30 July 2009, and released a report prepared by Network Advisory Services on 'Issues in relation to the availability and use of asset, expenditure and related information for Australian electricity and gas distribution businesses' on 21 August 2009. On 28 August 2009, the AEMC released its TFP design discussion paper and announced it would hold workshops on the matter on 28 September and 2 October 2009.

Terms of Reference Revised on Review of Extreme Weather Events
On 14 August 2009, the MCE revised the terms of reference for the Review of the Effectiveness of National Electricity Market Security and Reliability Arrangements in light of Extreme Weather Events. The AEMC is required to submit a second interim report providing specific advice on the reliability standard and the market mechanisms to achieve that standard. This second interim report must be provided by 18 December 2009.

Final Determination on Arrangements for Managing Risks Associated with Transmission Network Congestion
On 13 August 2009, the AEMC published notices under sections 102 and 103 of the National Electricity Law (NEL) of the publication of the Final Rule Determination (Arrangements for Managing Risks associated with Transmission Network Congestion) and of the making of the following Rules:

- National Electricity Amendment (Congestion Information Resource) Rule No 16 2009;
- National Electricity Amendment (Negative Inter-regional Settlements Residue Amounts) Rule No 17 2009;
- National Electricity Amendment (Fully Co-optimised and Alternative Constraint Formulations) Rule No 18 2009.

The AEMC decided not to make the proposed Network Augmentations Rule.

On 1 July 2009, the National Electricity (Australian Energy Market Operator) Amendment Rules 2009 and the National Gas (Australian Energy Market Operator) Amendment Rules 2009, both made by the South Australian Minister, commenced operation. These Electricity Rules are consolidated into version 30 of the National Electricity Rules and the Gas Rules into version 2 of the National Gas Rules.

On 30 June 2009, the AEMC published the 2nd Interim Report for the Review of Energy Market Frameworks in light of Climate Change Policies. Submissions were due on 3 August 2009. The review will conclude with the provision of final advice to the MCE.

Guidelines for the Determination of Compensation Following the Application of the Administered Price Cap, Market Price Cap, Market Floor Price or Administered Floor Price
On 30 June 2009, the AEMC published the guidelines for The Determination of Compensation Following the Application of the Administered Price Cap, Market Price Cap, Market Floor Price or Administered Floor Price, together with a supporting decision document.
National Competition Council

Outcome of the Certification of the NSW Water Industry Access Regime

On 14 August 2009 the Minister for Competition Policy and Consumer Affairs published his decision on the application for certification of the regime. The Minister accepted the Council's final recommendation (published on 11 May 2009) and determined that the regime be certified as effective for a period of ten years. Link

NCC Publishes Part D of the Guide to the National Gas Law

On 8 September 2009 the NCC published Part D of its guide to the functions and powers of the NCC under the National Gas Law. Part D relates to Greenfields pipeline incentives. Part D

Australian Capital Territory

Independent Competition and Regulatory Commission (ICRC)

Determination of Utility Licence Fees for 2009-10

On 23 September 2009 the ICRC announced it had determined annual licence fees for utilities providing water and wastewater services and for gas transmission services. Notice

Memorandum of Understanding - ICRC and AER

On 25 August 2009 the ICRC announced it had entered into a Memorandum of Understanding with the Australian Energy Regulator. The Memorandum of Understanding covers regular exchanges of views on issues, sharing of appropriate information and documents and cooperation on transitional issues. Memorandum

July 2009 Reports from Licensed Electricity Suppliers and Distributors

The Electricity Feed-in Code sets out practices and standards for the operation of the scheme for feed-in from renewable energy generators to the electricity network established under the Electricity Feed-in (Renewable Energy Premium) Act 2008. On 12 August 2009 it was announced that reports required under the code had been submitted by licensed electricity suppliers and ActewAGL Distribution that cover the period 1 March 2009 to 30 June 2009. Link

ACT GGAS Penalties for the 2009 Compliance Year


Compliance and Performance Report for 2007-08

On 2 July 2009 the ICRC published its report reviewing the performance of electricity, gas and water and sewerage utilities licensed in the ACT during 2007-08 and their compliance with their statutory obligations. Report

Variation of All Gas Connection, Distribution and Supply Licences

The ICRC announced on 2 July 2009 that it had varied all gas supply licences, and ActewAGL Distribution's gas distribution and connection licence. The variations follow the establishment of the Australian Energy Market Operator (AEMO) which has subsumed the functions of the Gas Market Company. Link

Momentum Energy Granted Electricity Supply Licence

On 6 August 2009, the ICRC granted Momentum Energy an electricity supply licence. Licence

New South Wales

Independent Pricing and Regulatory Tribunal (IPART)

Tillegra Dam and the Pricing of Hunter Water

See Notes on Interesting Decisions

IPART Calls for Submissions on a Number of Reviews

On 5 August 2009 the IPART invited submissions on its Review of Maximum Prices Charged for Water Management from 2010/2011. On 29 July 2009 issue papers were published, and submissions called for, on the Review of Prices for Country Energy's Water and sewerage services from 1 July 2010 and on the Review of bulk water prices to be charged by State Water Corporation from 1 July 2010. On 15 September 2009 the IPART also published an issues paper regarding the Review of the Operating Licence for Sydney Water Corporation. Link
IPART Releases Final Determinations on Water Prices for Hunter Water
On 17 July 2009 the IPART released a final determination on water, sewerage and stormwater charges for Hunter Water. The determination sets prices that will apply until 30 June 2013. Media Release

Michael Keating Announces Departure from IPART
On 28 August 2009 Michael Keating AC, Chairman of IPART, announced that he would be leaving the IPART on 11 September 2009. James Cox is to acts as Chairman from 12 September 2009. Media Release

Review of NSW Climate Change Mitigation Measures
See Notes on Interesting Decisions

2009 Review of Fares for Stockton and Private Ferries
On 11 September 2009 the IPART announced that it will determine the maximum fares that can be charged from December 2009/January 2010 by regular private ferry services and the Stockton ferry services. Fact Sheet

2009 Review of Fares for Rural and Regional Buses
On 4 September 2009 the IPART announced that it will determine the maximum fares that can be charged from January 2010 for regular bus services in rural and regional NSW. This review does not cover fares for services in outer metropolitan areas, which are reviewed as part of IPART’s metropolitan and outer metropolitan review. Written submissions on the rural and regional review are due on 7 October 2009. Fact Sheet

Draft Methodology Paper Released – Electricity
On 19 August 2009 the IPART released a Draft Methodology Paper for the Review of Regulated Retail Tariffs and Charges for Electricity 2010-2013. Paper

Victoria
Essential Services Commission (ESC)

Electricity Distributor's Communications in Extreme Supply Events
The Minister for Energy and Resources has requested the Commission consider a number of regulatory matters that are relevant to significant energy supply events. In particular, the Minister is concerned to ensure that, in the event of significant and widespread energy supply events, the community can be assured that:

- the communication of supply outage details are coordinated for consumers and the media
- support agencies are able to assist customers with special needs in the event that these customers are off supply for more than 24 hours
- there are improvements in regard to outage notifications to customers and options for better handling faults reported by customers
- call centres perform to high standards during these events.

The ESC published a consultation paper on 11 September 2009, seeking views as to whether, and how, these actions can be supported by regulation or other mechanisms to provide certainty in the likelihood that these extreme supply events will continue. The consultation period closes on 2 October 2009. Link

Amendment to the Energy Retail Code
In September 2008, the ESC commenced a review of energy retailers' compliance with the Energy Retail Code's requirements on early termination fees in small customer contracts. On 4 August 2009 the ESC published a supplementary report providing a summary of retailers' compliance and setting out retailers' risk management strategies in the electricity and gas industries. Supplementary Report. As an outcome of the compliance review, on 4 September 2009 the ESC published a draft decision proposing amendments to the Energy Retail Code in relation to the costs that retailers can include in early termination fees. The amendments also relate to what retailers may have regard to in determining a customer's unsatisfactory credit rating, in order to require a refundable advance. Submissions on the proposed amendments were due on 28 September 2009. Link
Victorian Energy Efficiency Target Scheme Acquisitions

The ESC is responsible for administering the Victorian Energy Efficiency Target (VEET) scheme that commenced on 1 January 2009. The scheme sets a target for energy savings to be achieved through the uptake of energy efficient technology, initially in the residential sector. Energy retailers are required to meet these targets by purchasing energy efficiency certificates. These certificates can be created by providing energy saving products and services to households. The amount of residential acquisitions is the key factor in determining the extent of a relevant entity's VEET scheme certificate liability. The ESC consulted on the best approach to determining residential acquisitions. A draft report was published on 18 September 2009. Draft Report

Retailers Fall Short on Renewable Energy Targets

On 21 August 2009 the ESC published the annual report of the Victorian Renewable Energy Target (VRET) scheme. Under the VRET scheme, renewable energy certificates are created by renewable electricity generators for subsequent acquisition and surrender by electricity retailers. The report found that the number of renewable energy certificates surrendered in 2008 fell short of the target. As a result, Victorian electricity retailers with obligations under the VRET scheme paid a total of $2.95 million in shortfall penalties. Media Release

Queensland

Queensland Competition Authority (QCA)

QCA Releases Final Report on Stage 1 of the Review of Electricity Pricing and Tariff Structures

On 8 September 2009 the QCA released its final report on Stage 1 of its Review of Electricity Pricing and Tariff Structures. The report examines the current Benchmark Retail Cost Index (BRCI) methodology, as well as Queensland’s existing retail electricity tariffs and alternative tariff structures. It follows a draft report released on 18 August 2009. A Comments Paper on of Stage 2 of the review was released on 11 September 2009. Link

2009 Retail Price Monitoring in South East Queensland Urban Water Sector

Under section 23A of the Queensland Competition Authority Act 1997, the Premier and the Treasurer referred the water supply activities of ten South East Queensland Local Governments to the QCA on 8 July 2009 for a price monitoring investigation. The QCA sought submissions until 24 July 2009. Link

QCA Approves QR Network’s Minerva DAAU

On 30 October 2008, QR Network submitted a voluntary draft amending access undertaking (Minerva DAAU) to the QCA. QR Network withdrew this DAAU on 3 July 2009 and submitted a revised Minerva DAAU proposal for approval. In it, QR Network proposed a revised reference tariff based on a new methodology for determining the cost base to apply to the coal-carrying train services operating from the Minerva mine to the port of Gladstone. On 20 August 2009, the QCA released its final decision to approve the revised Minerva DAAU. Link

QCA Consults on QR Network’s Vermont DAAU

On 3 July 2009, QR Network submitted a draft amending access undertaking (DAAU) to the Authority. In it, QR Network has sought to amend aspects of the 2008 access undertaking to provide for a new reference tariff for coal-carrying train services operating from the Vermont mine to the port of Gladstone. Following a request by the Queensland Resources Council, the Authority extended the due date for submissions to 17 August 2009. Link

QCA Approves QR Network’s 2007-08 Capital Expenditure Claim

QR Network’s 2008 access undertaking provides for the QCA to assess the prudency of QR Network’s capital expenditure on the central Queensland coal network on an annual basis. Once approved, the capital expenditure can then be included in QR Network’s regulatory asset base. On 30 June 2009, the QCA approved QR Network’s application for capital expenditure in the central Queensland coal region in 2007-08. Link

Vehicle Import Services – Fisherman Islands

On 17 July 2009, the Federal Chamber of Automotive Industries lodged with the QCA an application under section 77(1) of the Queensland Competition Authority Act 1997 requesting that the QCA recommend to the relevant Ministers that vehicle import services provided at Fisherman Islands be declared for the purposes of third party access. The QCA is yet to seek submissions on this application. Link
South Australia

Essential Services Commission of South Australia (ESCOSA)

Amendment to Energy Retail Code
On 22 September 2009 the ESCOSA published a discussion paper, setting out proposed amendments to the Energy Retail Code to prevent the disconnection of electricity for non-payment during extreme weather conditions. During the heat-wave conditions experienced in South Australia in January and February 2009, the ESCOSA became concerned at the potential consumer impacts, particularly health impacts, of electricity disconnection in extreme hot weather. Submissions are due on 30 October 2009.

Amendment to REES Code – Lighting Activity Specification
On 19 August 2009, the ESCOSA published an open letter seeking views on its proposal to amend the lighting activity class table contained in the lighting specification established by the Minister for Energy for the purposes of the Residential Energy Efficiency Scheme (‘REES’). On 24 September 2009, after considering submissions, the ESCOSA published its determination.

Strategic Plan 2009 to 2012
On 12 August 2009, the ESCOSA announced its Strategic Plan 2009-12 had been approved by the Treasurer. The ESCOSA is required to submit an annual performance plan under s.23 of the Essential Services Commission Act 2002.

Electricity Generation Licence Issued to Royal Agricultural & Horticultural Society of SA Inc
On 3 September 2009 the ESCOSA issued an electricity generation licence to the Royal Agricultural and Horticultural Society of South Australia Inc. This is the first generation licence issued by the ESCOSA for an embedded solar photovoltaic system.

2009 Rail Access Regime Inquiry: Draft Inquiry Report

Proposed Amendments to Electricity Metering Code
On 7 July 2009, the ESCOSA proposed amendments to the Electricity Metering Code to reflect the new national arrangements for the provision of metering installations and metering data services.

Licence Conditions for Wind Generators Draft Decision
On 7 July 2009, the ESCOSA released a Statement of Clarification in relation to the fault ride through requirements contained in the Commission’s Draft Decision on Licence Conditions for Wind Generators as released on 25 June 2009.

Adjustments to Electricity Reselling Prices
On 30 June 2009 the ESCOSA published an open letter announcing adjustments to ETSA Utilities’ network tariffs and AGL SA’s standing contract prices. These decisions have an impact on the maximum electricity reselling prices that can be charged for the period 1 July 2009 to 30 June 2010.

Tasmania

Office of the Tasmanian Energy Regulator (OTTER)

Proposal to Maintain Declaration of Retail Services for Non-Contestable Customers
In September 2009 the OTTER published a consultation paper and proposed to maintain the current declaration of electricity retail services, which will expire on 30 June 2010, for the next regulatory period.

OTTER Publishes APAYG Price Comparison Report
Aurora Pay as You Go (APAYG) is a prepayment option offered by Aurora Energy to residential customers as an alternative to being supplied electricity under standard tariffs. APAYG prices are not regulated, but the OTTER publishes a comparison report each year to allow customers to compare APAYG rates with standard tariffs. On 15 June 2009 the OTTER published the third APAYG Price Comparison Report. A supplementary report was published in August 2009 examining the new concessions available to APAYG concession customers effective 1 August 2009.
Draft Report on the Review of Aurora’s Pay as You go (APAYG) Product
Following public concern regarding the July 2009 adjustment to APAYG prices, the Government requested the OTTER review a number of aspects of the APAYG offering. The OTTER published a draft report in September 2009. Submissions on the draft report are due on 9 October 2009. Draft Report

2009 Review of the Reliability of the Tasmanian Power System
The OTTER commenced the 2009 review of the reliability of the Tasmanian power system in September 2009. A workshop to identify, explore and discuss reliability issues will be held on 9 October 2009 and submissions are due on 19 October 2009. Link

Aurora Energy Pro-forma Fallback Contract
On 27 August 2009 the OTTER released its final decision on Aurora Energy's draft pro-forma fallback contract for Tranche 4 customers and proposed retail margin and retail service costs. The effective date for the approved pro-forma fallback contract was the gazetted date, 2 September 2009. Final Decision

Gas Pipeline Construction Licence Granted to BOC Limited
On 27 August 2009 the Director of Gas granted a gas pipeline construction licence to BOC Limited. The decision followed a period of consultation on the proposed licence, which closed on 14 August 2009. Gas Licences

Revised Consultation Policy and Procedures of the Tasmanian Economic Regulator Guideline
A revised Consultation Policy and Procedures of the Tasmanian Economic Regulator Guideline took effect from 6 August 2009. The Guideline provides guidance as to the general policy and procedures that the Regulator intends to apply in the exercise of its discretion in the formulation of any policy or the making of any determination. Link

July Edition of the OTTER Newsletter Released
The quarterly newsletter provides an update on current issues associated with OTTER’s regulatory activities associated with electricity, gas, water and sewerage and pricing investigations. The July edition covered the recent APAYG price comparison report and the development of the Interim Pricing Order for the water and sewerage sector, which applied from 1 July 2009. The newsletter also reported on Aurora Energy’s quarterly electricity performance and on general generation activity in Tasmania. Newsletter

Western Australia
Economic Regulation Authority (ERA)
Annual Wholesale Electricity Report – Discussion Paper Released
On 15 July 2009, the ERA released a discussion paper in relation to its review of the effectiveness of the State’s Wholesale Electricity Market. Under the Wholesale Electricity Market Rules, the ERA is required to report at least annually to the Minister for Energy on the effectiveness of the WEM in meeting the wholesale market objectives. Discussion Paper

Western Power’s Access Arrangements
On 16 July 2009 the ERA issued a draft decision on Western Power’s proposed access arrangement revisions. Submissions on that draft closed on 10 September 2009. On 24 September 2009, the ERA issued an invitation for submissions to an additional revision proposed by Western Power, relating to the start and end dates of each pricing year. The ERA expects to publish a final decision on the full revisions by 4 December 2009. Media Release

Revisions to the Goldfields Gas Pipeline Access Arrangement
On 16 September 2009 the ERA proposed to extend the date for its final decision on the access arrangement for the Goldfield’s Gas Pipeline by two months, to 23 November 2009. Notice

Goldfields Gas Pipeline – Quarterly Reference Tariff Adjustment
On 12 August 2009 the ERA allowed an adjustment to the reference tariff for the Goldfields Gas Pipeline (GGP) proposed by Goldfields Gas Transmission Pty Ltd. The adjustment reflects a 0.48 per cent increase in the Consumer Price Index in the quarter ending June 2009. Notice

Presentation by the Chairman
The Chairman of the ERA, Mr Lyndon Rowe, addressed the Australian Institute of Energy’s ninth Energy in Western Australia conference on 27 August 2009. A copy of his presentation, Energy Markets – What Will They Look Like in 10 Years Time?, was made available on 2 September 2009. Presentation
Inquiry into Water Resource Managements and Planning Charges
The ERA published on 6 August 2009 a discussion paper as part of its inquiry into water resource management and planning charges. The purpose of the discussion paper was to outline the ERA’s preliminary views on the principles that should guide the setting of water resource management and planning charges. Submissions were due 31 August 2009. Discussion Paper

Inquiry into Tariffs of the Water Corporation, Aqwest and Busselton Water
On 16 September 2009 the ERA’s final report on its inquiry into the tariffs of the Water Corporation, Aqwest and Busselton Water was tabled in Parliament. The report contained the recommended tariffs for the water, wastewater and drainage services provided by the Water Corporation, and the water services provided by Aqwest and Busselton Water, for a three-year period beginning on 1 July 2010. Final Report

The Pilbara Infrastructure – Final Determinations
On 18 September 2009 the ERA published its final determination on the Pilbara Infrastructure’s proposed Train Management Guidelines. The ERA also published its final determination on The Pilbara Infrastructure’s revised proposed Segregation Arrangements on 31 August 2009 and on its Train Path Policy on 18 August 2009. PricewaterhouseCoopers was commissioned to provide advice on all three matters. Final Determinations: Train Management Guidelines, Segregation Arrangements, Train Path Policy

Final Determinations on Floor and Ceiling Costs
The ERA published its final determination on floor and ceiling costs for WestNet Rail (WNR) on 6 July 2009 and for the Public Transport Authority on 25 September 2009. Final Determination (WestNet), Final Determination (Public Transport Authority)
Notes on Interesting Decisions

Germany: More Collaborative Market Areas Formed
In Germany a gas market consists of the interconnected networks of a number of independent operators. The Federal Network Agency (FNA) announced on 26 August 2009 the creation of new market areas, which reduces the current number of market areas in Germany from ten to six. The mergers of market areas, being undertaken by large network operators, are the result of lengthy negotiations in which the FNA played an active role. According to the FNA, larger market areas facilitate the transport of gas by eliminating the costs that were previously incurred when gas flows crossed from one market area to another. The scope for competition is therefore increased by larger markets. The remaining market divisions can be accounted for by the different quality of gas (high and low calorific).

Flow commitments may be necessary with merging market areas since original market area borders between the relevant networks will cease to exist. This can sometimes cause technical problems when trying to meet existing capacity agreements after a merger, in a larger and more extensive network area. Flow commitments secured by a network operator from shippers are intended to ensure an increase or decrease of the physical gas flows at the points at risk of congestion. On 10 August 2009 the FNA announced that it intends to treat the costs of flow commitments as non-controllable costs under the current incentive regulation framework if certain prerequisites are met.

UK: Ofgem Restructured to Meet Low Carbon Challenge
On 8 September 2009 the Ofgem announced the creation of a new business unit, the Ofgem E-Serve, as part of a major restructuring of the regulator to meet the challenge of helping to deliver a low-carbon economy. The Ofgem E-Serve will focus on administering environmental programs and the delivery of sustainability projects like offshore wind, smart meters, the proposed carbon capture and storage levy, and feed-in tariffs. A new local grids business unit has also been created within the Ofgem, to help ensure regional electricity networks play a more active role in tackling climate change in the future. The changes are intended to enable the Ofgem to deliver the reforms needed to meet Britain’s emissions targets.

UK: Ofgem Releases Reports on Suppliers’ Social Obligations and Voluntary Social Programs
The UK’s Gas and Electricity Acts require the Ofgem to have regard to the interests of individuals who are disabled, chronically sick, of pensionable age or on low incomes. Its Social Action Strategy sets out how the Ofgem will seek to meet these social obligations. The Ofgem released its Social Action Strategy – Update for 2009-10 in June 2009.

Domestic energy suppliers are subject to certain social obligations as a condition of their supply licence. The Ofgem collects data from domestic suppliers on their performance and practice in relation to, among other things, debt and disconnection, priority services register services and energy efficiency advice. The data are gathered and published on a quarterly basis and published on the Ofgem website. The Ofgem also publishes an annual report that presents a more comprehensive analysis of suppliers’ performance in these areas. The Social Obligations Annual Report 2008 was published on 27 August 2009.

The UK Chancellor in the 2008 Budget announced a targeted increase in gas and electricity suppliers’ collective expenditure on voluntary social programs to at least £150m a year by 2011. These social programs are designed to help ‘fuel poor’ (households that cannot afford to heat their homes adequately) and vulnerable consumers. On 18 August 2009 the Ofgem released a report on the range of voluntary measures suppliers have undertaken under these programs in the first year of the commitment (2008-09). The report also confirms that suppliers have each met the expenditure target set by the Government for the first year of the programs’ operation.

UK: Ofwat Advises UK Government on Threshold for Legal Separation of Water and Sewerage Businesses
In 2008, the UK Government commissioned an independent review of competition and innovation in water markets (the Cave Review). The review’s interim report recommended legally separating the retail household and business activities of water companies. The UK government indicated that it was ‘strongly minded’ to mandate legal separation, but would respond fully to the recommendation once the review’s final report was released. The Government
also requested that the review consider the impact of legal separation on small companies.

In its final report, the review found that the costs of legal separation for small companies could be higher on a per customer basis than for other companies. Thus it suggested that a threshold for small companies, below which legal separation would not be mandated, might be appropriate in order to maximise net overall benefits. It suggested that the Ofwat should advise the Government on whether such a threshold is appropriate and, if so, its level. The Government subsequently asked the Ofwat to address those issues.

In July 2009, the Ofwat published a document containing its finding that there does not appear to be a strong case for introducing a threshold. Qualitatively, the Ofwat was concerned that exempting some companies from the requirement to legally separate ran a risk of unfairly discriminating between competing companies, and disrupting the operation of markets. In addition, the Ofwat considered that it may be more efficient for the smallest companies to sell or merge their retail activities, which might also provide benefits for consumers. A quantitative analysis of the costs and benefits of legal separation of small companies was also carried out and suggested a threshold was unnecessary. However, if the Government were minded to introduce a threshold for company size, the Ofwat considered it should be set at 50,000 billed properties. Advice

US: FCC Announces Wireless Inquires

In 1993, the US Congress established the promotion of competition as a fundamental goal for Commercial Mobile Radio Service (CMRS) policy formation and regulation. To measure progress toward this goal, Congress required the FCC to submit annual reports that analyse competitive conditions in the industry. In May 2009, the Wireless Telecommunications Bureau within the FCC issued a Public Notice to commence the data collection and consultation for the fourteenth annual report in this series.

On 27 August 2009, the FCC issued a Notice of Inquiry (NOI) seeking to expand and enhance its analysis of competitive conditions, both to improve its assessment of the current state of competition in the entire mobile wireless market and to better understand the net effects on the American consumer. The FCC will consider the combined record from both the Public Notice and this NOI in its analysis of mobile wireless competition for the next annual report. Comments on the issues raised in the NOI document were due by 28 September 2009 with comments-in-reply due on 13 October 2009. Notice of Inquiry (09/67)

The FCC also issued a Notice of Inquiry into Wireless Innovation and Investment on 27 August 2009. The FCC seeks to identify concrete steps that it can take to support and encourage further innovation and investment in the wireless marketplace. The FCC also seeks to better understand the factors that encourage innovation and investment throughout this market. Comments were due by 28 September 2009, with comments-in-reply due on 12 October 2009. Notice of Inquiry (09/66)

NSW: Review of NSW Climate Change Mitigation Measures

On 2 July 2009, the IPART released a report on its review of NSW Government measures that are designed to mitigate the effects of climate change. The Government had directed IPART to review the measures to ensure they complement, rather than take away from or duplicate, the measures contained in the Federal Government’s Carbon Pollution Reduction Scheme (CPRS). The report recommends a method for assessing NSW climate change mitigation measures, based on certain criteria. In particular, IPART assessed that a mitigation program will be complementary to the CPRS if it overcomes a barrier to emissions reduction not addressed by the CPRS, or if it reduces emissions more cheaply than the CPRS. Other criteria included whether the program addresses a sector of the economy where price signals do not play a significant role in decision-making (e.g., land use and planning), or whether it has one or more non-abatement objectives (including assisting individuals or organisations to adjust during the transition to a carbon-constrained environment) that do not adversely affect the efficient operation of the CPRS. Against these criteria, IPART reviewed 26 NSW programs and recommended whether they should be retained in full, retained in part, or be terminated. This included programs in energy efficiency, low emissions generation and programs to reduce emissions directly. Media Release
‘Treatment of Large, Growth-related Capex – A Case study: Tillegra Dam and the Pricing of Hunter Water Services’. Amanda Chadwick, James Cox and Dennis Mahoney

The NSW Government has directed the Hunter Water Corporation (HWC) to construct a 450 gigalitre dam at Tillegra north-west of Newcastle. Hunter Water estimates cost of construction at $406.3 million (net the sale of surplus land). Construction is expected to improve the drought security of the current population and to facilitate population growth in the region. Concern about the inter-generational equity and affordability of the dam were amongst the most significant issues in the IPART’s recent review of HWC’s prices.

Analysis commissioned by the IPART in 2008 (Sinclair Knight Mertz, Review of Yield Estimates for Hunter Region) highlights that the dam would be initially under-utilised, raising concerns about inter-generational equity. It found that, while some augmentation of the Hunter water supply system was likely to be required in the next 15 years, the dam would not be fully utilised until 2058. It also found that the key benefit for the current population was a very significant improvement in drought security – it would reduce the probability of entering drought restrictions in 2025 from 1 in every 21 years to 1 in 1,250 years. The community’s willingness to pay for this drought security is unknown, however HWC estimated that the cost of alternative measures to provide this level of drought security was equivalent to 40 per cent of the cost of the dam’s construction.

It was not possible for the IPART to defer the inclusion of the costs of the dam into the regulatory asset base as it had received a direction from the NSW Government to recognise these costs in prices. Rather, the IPART considered five different pricing options that would recover the efficient cost of the dam, ensure the utility’s financial viability and be affordable and equitable for customers.

In considering alternative pricing options, the IPART reviewed recent regulatory precedents on the treatment of large, initially under-utilised capital projects, including: the Irish Commission for Economic Regulation’s pricing of the gas interconnector pipeline between Ireland and Scotland; the ACCC’s Central Ranges Pipeline Access Arrangements 2005-19; and the IPART’s deferral of depreciation in its County Energy determination of 2004.

The IPART examined five options in detail. Each option was modelled to fully recover the costs of the dam in the sense that the net present value (NPV) of the revenue requirement in each case equalled the NPV of the dam’s costs. The five options examined and the IPART’s major conclusions are listed below:

- **Option 1**: Double the assumed dam life, thus halving the annual depreciation charge. However, given the small value of annual depreciation, the effect on the revenue requirement was minimal.
- **Option 2**: Lower the allowable rate of return in the early years. While, the option had a positive impact on affordability, there was no clear case for arbitrarily adopting a lower WACC.
- **Option 3**: Spread the costs of the dam over time, using a constant real revenue requirement (or annuity). However, the annuity drew forward the revenue required ahead of dam costs in early years, a feature that would be difficult to justify to stakeholders.
- **Option 4**: Use a real revenue stream (or annuity) that increased over time in step with the expected rise in the take-up of the dam’s capacity. This option also drew the revenue required ahead of the time when costs would be incurred.
- **Option 5**: Recover the drought-security ‘value’ of the dam’s costs in current prices, and align recovery of the remainder with the take-up of dam’s capacity until it is fully utilised.

* James Cox is Chief Executive Officer and Full-time Member and Amanda Chadwick and Dennis Mahoney are Program Managers, Independent Pricing and Regulatory Tribunal of NSW (IPART).
Importantly, the approach adopted aligns the recovery of costs with the benefits that the dam provides to the current and future populations in the Hunter Region. The figure below shows how the annual revenue required per connection will change over the next 40 years compared to how it would have been had the full cost of the dam been incorporated in the current determination (the ‘base case’).

The figure illustrates that the approach adopted means lower bills in the early years and higher bills later on. Before adopting this approach, the IPART analysed the longer term impacts on prices and HWC’s financial viability. The modelling showed that the average projected annual increase in a typical residential bill would be around 1.7 per cent. This is expected to be affordable and yet will not result in any deterioration in HWC’s financial position.

A detailed explanation of the IPART’s approach is in Review of Prices for Water, Sewerage, Stormwater and Other Services for Hunter Water Corporation: Final Report July 2009, Chapter 4.

The table below illustrates the indicative increases in water prices that would have arisen under the various options modelled.

<table>
<thead>
<tr>
<th>Option</th>
<th>increase water price by 2012/13</th>
</tr>
</thead>
<tbody>
<tr>
<td>Base Case (full recovery of dam costs in current determination)</td>
<td>63.8 %</td>
</tr>
<tr>
<td>Option 1 (halve depreciation rate)</td>
<td>61.8 %</td>
</tr>
<tr>
<td>Option 2 (lower allowable rate of return to 2%)</td>
<td>43.0 %</td>
</tr>
<tr>
<td>Option 3 (constant annuity)</td>
<td>61.7 %</td>
</tr>
<tr>
<td>Option 4 (annuity reflects water use)</td>
<td>56.0 %</td>
</tr>
<tr>
<td>Option 5 (recover drought security value of dam in current determination, recover remainder as dam utilised)</td>
<td>45.7 %</td>
</tr>
</tbody>
</table>

After weighing up the pros and cons of each option, the IPART adopted Option 5 on the ground that it represented the best balance between affordability, equity and financial viability. Option 5 mitigated price rises in the current determination (thus addressing consumer affordability). Yet it required prices to rise over time in line with utilisation of the dam (thus addressing intergenerational equity). Finally, it equated the present value of revenue required to the present value of the costs of the dam (thus addressing HWC’s financial viability).
Regulatory News

Utility Regulators Forum Meeting

Network is the newsletter of the Utility Regulators Forum (URF). The ACCC, with state and territory regulatory agencies, set up the URF to share information and develop understanding of the activities of various regulators and industries as they implement reform. As well as exchanging information, the aim of the URF is to encourage consistency in the application of regulatory functions and to review new ideas about regulatory practices. The URF meets twice yearly and all members have a turn to host the event. The next meeting will be held on 30 October 2009 in Western Australia. A wide-ranging agenda is being developed.

2009 ACCC Regulatory Conference

The tenth ACCC Regulatory Conference was held on the Gold Coast, Queensland, on 30-31 July 2009. The tenth regulatory conference of the Australian Competition and Consumer Commission and the Australian Energy Regulator was held in Queensland in late July 2009. The theme of the conference, The Regulation of Infrastructure in a Time of Transition, attracted a conference attendance of around 430 people. The tradition of inviting eminent international speakers was maintained. Papers from the conference are available on the ACCC website.

Planning for the 2010 conference has already commenced. As it will be 15 years since the implementation of National Competition Policy some reflections on expectations and outcomes might be expected on the program.

Network is a quarterly publication of the Australian Competition and Consumer Commission for the Utility Regulators Forum. For editorial enquiries please contact Rob Albon (Robert.Albon@accc.gov.au) and for mailing list enquiries please contact Katrina Huntington (Katrina.Huntington@accc.gov.au).