

## Public policy for regulators: Is “market failure” passé?

Darryl Biggar, Deputy Chief Economist, ACCC

*There is a traditional three-step economic approach to public policy. The first step is identification of the economic problem to be solved or the grounds for intervention, in the form of a “market failure”. The second step is identification of the options to address that economic problem and the third step is the assessment of the costs and benefits of those options. This framework is a useful intellectual discipline but may have fallen out of favour in recent years. This note addresses possible objections to placing this framework at the foundation of our decision-making*

### Introduction

The traditional economic approach to public policy is *welfarist* – that is, it starts from the presumption that all public policy should seek to promote a concept of economic welfare.<sup>1</sup>

Since the time of Adam Smith, economists have observed that, operating against a background of effective property rights and contract law, competitive markets are, in general, an effective tool for promoting economic welfare. More specifically, competitive markets generally deliver the products and services that consumers desire, in the amounts and locations that consumers desire, allocating those products and services to those who value them most highly, ensuring they are produced as efficiently as possible, and ensuring efficient levels of on-going investment and innovation. Importantly, competitive markets achieve these outcomes despite constant on-going changes in the environment, including changes to tastes and technology. As John Kay has said:

“If the partial genius of market economies lies in their capacity to achieve co-ordination without a co-ordinator, the greater genius lies in their ability

to innovate and adapt in an environment of uncertainty and change.”<sup>2</sup>

There is a broad consensus amongst economists that, where they operate effectively, no human institution is better able to deliver economic welfare in the long run than well-regulated competitive markets. This is not intended as an ideological assertion but rather as a pragmatic observation which sees:

“... the primacy of the market neither as an ideal nor a necessary evil, but as the best pragmatic solution to a wide range of economic problems.”<sup>3</sup>

The traditional economic approach to public policy takes this observation as a starting point and asserts that government intervention in markets can be limited to situations where conventional competitive markets do not operate effectively.

Scenarios where conventional competitive markets do not operate effectively are known in the economics literature as cases of “market failure”. Importantly, there are only a handful of grounds for market failure. These include “externalities”, “public goods”, “asymmetric information”, and market power. In addition, as Coase emphasised, transactions costs play a key role in almost all market failures. Many market failures can be viewed as arising from transactions costs

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<sup>1</sup> The [OECD](#) notes: “regulation should only proceed if it is expected to improve society’s economic and social welfare”. Similarly, the [PC](#) notes: “The over-riding objective for government business programs must be to improve overall community welfare”.

<sup>2</sup> This quote comes from John Kay’s critique of the concept of market failure, “[The failure of market failure](#)”, Prospect Magazine, 1 August 2007. His critique is not so much a critique of the conventional three-step approach to public policy, as it is a critique of the economic models used (including models of the functioning of competitive markets, and models of contracting and incentives).

<sup>3</sup> Kay (2007), note 1.

(e.g., due to a lack of well-defined property rights) that hinder efficient trade and exchange.<sup>4</sup> This concept of market failure lies at the foundation of the traditional economic approach to public policy.

According to the traditional economic approach to public policy, when considering intervention in the economy, the policy analyst should follow a three-step process:

- The first step involves the *identification of the underlying problem* – that is, the underlying market failure which might justify government intervention. This market failure must be linked to a reduction in economic welfare.
- The second step is *identification of a range of options* to address that market failure.
- The third step is an *assessment of the costs and benefits of those options* (including the option of doing nothing). The mere identification of a problem is not sufficient to justify that some intervention is required. The policy analyst must pay explicit attention to the practical difficulties of implementing various forms of intervention, including the incentives, information, and governance of the enforcement institution (sometimes known as “government failure”).

A form of this process is mandatory in Australia for new regulatory proposals – as part of the preparation of a Regulatory Impact Statement (RIS), according to the rules administered by the Office of Best Practice Regulation (OBPR).<sup>5</sup>

At one level, this three-step process could be viewed as just common sense. After all, clearly defining the problem to be solved is a key first step in any high-quality decision-making process. For many years the OECD has advocated for Regulatory Impact Analysis which starts with these three basic questions.<sup>6</sup>

However, the economic approach to public policy requires more than just a clear definition of the problem – it also requires that the problem be identified with a form of market failure. As there are relatively

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<sup>4</sup> For example, in the absence of transactions costs “market power” would not give rise to an economic harm as the dominant firm and its customers could reach agreement on an efficient level of production and allocation of that production. The same is true for public goods and externalities. There is a sense in which “transactions costs” underlie all market failures.

<sup>5</sup> See OBPR, [Australian Government Guide to Regulatory Impact Analysis](#), Second edition, 2020.

<sup>6</sup> See OECD, [Introductory Handbook for Undertaking Regulatory Impact Analysis](#), 2008.

few sources of market failure, this gives the problem definition some real bite.

Market failure is not the *only* justification for government intervention. Government action is required in establishing the property rights and contract rules which underpin all market systems.<sup>7</sup> There are a few other grounds for intervention which do not fit nearly in the ‘market failure’ paradigm.<sup>8</sup>

This semi-formal approach to public policy remains a highly valuable framework for economic policy analysis. It encourages rigour in economic policymaking and clarifies the link between market outcomes, market failure and economic welfare. It also encourages the analyst to think widely about options, to target those options to the underlying economic problem, and promotes clarity and transparency in the assessment of the options.

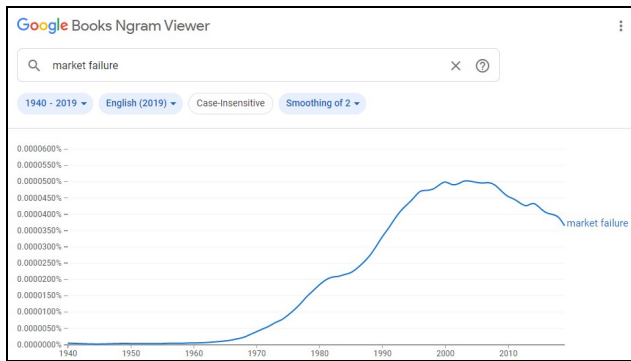
But perhaps there has been something of a waning of enthusiasm for this approach in recent years? Google’s NGram Viewer reveals how the frequency of use of certain words and phrases in books has evolved over the last 200 years. A search for the term “market failure” reveals that the term that was virtually unknown before the 1940s, took off in the 1960s following the seminal paper by Francis Bator.<sup>9</sup> But, in recent years, usage has declined.

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<sup>7</sup> This includes constructing and enforcing property rights in, say, intellectual property or radio spectrum.

<sup>8</sup> Other possible grounds for intervention in markets include: (a) to redistribute income, (e.g., through taxation and social welfare programs); (b) to promote “equality of opportunity” in society (this can justify the provision of free education, taxes on inheritance, health care independent of need); (c) to overcome behavioural biases or disabilities which limit the ability of consumers to make rational choices (e.g., short-termism versus savings for retirement, protection from high-pressure sales techniques, protection for young children, drug addicts, or the elderly or infirm); and (d) to promote coordination, standards, and/or to promote interoperability (e.g., driving on the left). Governments may, in practice, also intervene to promote the interests of one social group over another (such as domestic citizens over foreigners), or to offset the adverse effects of other regulations. “Health and safety” is not a separate ground for intervention, but rather a reflection of externalities, public goods and asymmetric information (e.g., control of motor vehicle accidents, subsidy of vaccines).

<sup>9</sup> Bator, Francis M. “The anatomy of market failure.” *The Quarterly Journal of Economics* 72.3 (1958): 351-379.



Is this three-step approach to public policy – with its central focus on market failure – still relevant for regulatory authorities in Australia in the current decade? This note explores some potential objections to restoring its place at the foundation of our decision-making.

### Is the public policy approach of less relevance to regulators or competition enforcers?

Is the public policy approach described above only of relevance to central-government policy agencies? After all, regulatory authorities operate under an established legislative framework, with limited scope for discretion. Even where there remains discretion, many authorities develop guidelines and policies which make clear how they will exercise that discretion – limiting the scope for decision-making. Even in the absence of explicit guidelines, over time, “rules of thumb” may develop in settled areas of the authority’s work further reducing the scope for discretion.

Furthermore, a regulatory authority might argue that their governing legislation makes it clear what is illegal and what is permissible. The role of a regulatory authority, they might assert, is simply to enforce the law. In this context, what role is there for public policy decisions and the three-step process?

This perspective overlooks the fact that regulatory authorities retain considerable scope to make decisions about whether and how to enforce the law. The exercise of that discretion is itself a public policy decision.

Even if the law makes clear what behaviours are permitted, in almost all cases regulatory authorities have discretion over *how* they enforce the law - in choosing which cases to take, in allocating enforcement resources, in interpreting and applying the rules, and in determining remedies to accept. In some cases, regulatory authorities have discretion over which firms or services fall within the regulatory framework – such as the process of declaration under Part IIIA or Part XIC of the CCA. These are all public policy decisions.

We cannot know how to enforce the law (that is, how to allocate enforcement resources, how to choose which cases to take, or which remedies to accept) or which firms or behaviours should be captured by the law (that is, the scope of the regulatory framework) without an understanding of the underlying economic harm to be addressed. In other words, we must understand the market failure that is driving the need for intervention and the link between correcting that market failure and economic welfare.

Policies, guidelines, or rules-of-thumb are useful tools for regulatory authorities to expedite the enforcement process without the need to revisit first principles with every decision. But those policies inevitably need to be updated from time to time. That updating is itself a public policy decision.

In addition, many regulatory authorities have an explicit public policy role – advising the government on regulatory reforms in their domain of expertise. Almost certainly a regulatory authority will be consulted before major changes to their regulatory framework. In giving that advice the regulatory authority must be able to speak the language of public policy, including identifying the market failure and its link to economic welfare.

Lastly, many regulatory agencies have a formal advocacy role, for example the ability to carry out market studies and to make recommendations for reform. Again, this is a conventional public policy role, for which the three-step process above should be the norm.<sup>10</sup>

### If everything we do is related to the control of market power, do we need to talk about market failure?

A related concern is that the analyst might consider that the entire foundation for the regulatory authority – that is, its entire *raison d’être* – is based on addressing a particular market failure. Raising that market failure and its link to economic welfare in every decision might be viewed as repetitive, redundant, or pedantic.

For example, it is widely accepted that a large part of the work of the ACCC involves addressing the market failure known as market power. This is so ubiquitous

<sup>10</sup> From time to time, a regulatory agency may be mandated to perform a task which it believes will actively reduce overall economic welfare. The three-step process retains relevance as a tool for promoting transparency and rigor in logic. In this case, the first step of identifying the underlying market failure is replaced with identification of the objective for the regulatory or legislative obligation. This remains important for identifying the range of options, and the assessment of those options.

in the work of the ACCC that it might be thought that it hardly needs mentioning. After all, “everyone knows” that market power is bad for economic welfare. Can’t we just get on with tackling that market power?

While we don’t always need to spell it out in our decisions, periodically returning to first principles – especially identifying the market failure and the link to economic welfare – remains highly valuable as an intellectual exercise. Amongst other things, it promotes transparency and rigour in the decision-making process. The process can bring out assumptions in our logic and highlight where there are uncertainties and room for debate.

Perhaps surprisingly, there remains substantial debate in the competition law and policy literature on the meaning of the term market power and its link to economic welfare. Systematic application of the public policy approach would bring these debates into the open, potentially improving the quality of our decisions.

To illustrate, many competition and regulatory agencies consider that charging high prices is itself an exercise of market power, is economically harmful, and should be opposed. Yet, according to standard textbook models of economic welfare, high prices are not harmful in themselves, it is only when those high prices are associated with a decline in sales volumes that there arises a “deadweight loss”. In circumstances where there is no decline in sales volumes (e.g., where demand is inelastic, where the dominant firm can use a two-part tariff, can effectively price discriminate, or where the dominant firm and its customers are able to reach an efficient negotiated outcome), there is in principle no economic harm and therefore no grounds for intervention. This conclusion is counter-intuitive and does not reflect the decisions competition or regulatory agencies would make in practice.<sup>11</sup>

If there is a conflict between our decisions and our concept of economic welfare, as we understand it from economic theory, we should either change our decisions or change our theory.<sup>12</sup>

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<sup>11</sup> When faced with the observation that, according to the textbook theory, some price rises may have no impact on economic welfare, a common response is to dismiss such scenarios as unrealistic or of no practical significance. But what should we do when we come across a case or market situation where this scenario is not so easily dismissed?

<sup>12</sup> I have argued that there is a need to change our theory. See Biggar, Darryl. “Is protecting sunk investments by consumers a key rationale for natural monopoly regulation?.” *Review of Network Economics* 8.2 (2009); Biggar, Darryl. “Why regulate airports? A

The broader point here is that even if “everyone knows” that we are dealing with a particular market failure, it does not follow that there is a consensus understanding of how that market failure affects economic welfare, or what policies would best promote economic welfare. In this context, the public policy approach, with its three-step process, retains considerable value as an intellectual discipline – it ensures that we are transparent about the mechanism linking that market power to a decline in economic welfare, and it ensures that we are consistently considering the full range of potential tools and options for addressing that market failure. Where special cases or exceptions arise, we can identify those cases and identify alternative solutions as appropriate.

### **I observe market outcomes that seem wrong (e.g., unfair). Why can’t I just tackle the problem directly rather than pursuing this three-step process?**

From time-to-time policymakers or regulatory authorities identify market outcomes that *just seem wrong*, and which need to be fixed. They may be tempted to bypass the three-step process above and jump straight to fixing the problem.

For example, a decisionmaker might come across behaviour that seems *unfair*. That decisionmaker might seek to put in place rules to prohibit unfair practices.

But, as noted above, the economic approach to public policy is fundamentally welfarist. It is *only* the impact on economic welfare that matters. Certainly, an unfair practice may undermine economic welfare, and that may justify regulatory intervention. But it is only the ultimate impact on welfare that is important, with no independent weight given to concerns of fairness. As economists, we cannot skip the link to welfare and jump straight from “unfair” to “intervention”.

That unfairness is not an independent justification for policy action is articulated most clearly by two leading scholars of competition policy. In a lengthy Harvard Law Review piece, Kaplow and Shavell<sup>13</sup> argue that assessment of legal policies (or, in our case, regulatory policies) should be based exclusively on their

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re-examination of the rationale for airport regulation.” *Journal of Transport Economics and Policy*, 46.3 (2012): 367-380; Biggar, Darryl, and Alberto Heimler. “Digital platforms and the transactions cost approach to competition law.” *Industrial and Corporate Change* 30.5 (2021): 1230-1258.

<sup>13</sup> Kaplow, L. and S. Shavell, 2001, “Fairness versus Welfare”, *Harvard Law Review*, 114(4), 961-1388

effects on welfare<sup>14</sup> with no independent weight accorded to “conceptions of fairness, such as corrective justice and desert in punishment”.

For Kaplow and Shavell, giving independent weight to notions of fairness is not just unnecessary, it is positively harmful. They point out that:

“when the choice of legal rules is based even in part on notions of fairness, individuals tend to be made worse off. Indeed if any notion of fairness is ascribed evaluative weight, everyone will necessarily be made worse off in some circumstances”.

Kaplow and Shavell acknowledge that notions of fairness have a strong intuitive appeal in the broader population, but observe that this likely reflects an underlying concern with the promotion of well-being. They conclude that:

“the design of the legal system should depend solely on concerns for human welfare”.

We are not at liberty to bypass the three-step process just because we think an outcome is unfair. It remains important to articulate the link with economic welfare, to identify the range of options for addressing the harm, and to carefully assess those options.

It is not hard to construct a plausible economic framework in which “unfair contract terms” reduce economic welfare. For example, consider the case against including “unfair” terms in the fine print of a contract: for many consumers, a requirement to carefully read detailed lengthy terms and conditions would impose a significant cost on transactions. In a context of repeated, low-value transactions, and without external intervention to protect consumers from “gotcha” clauses, consumers may be reluctant to engage in trade or forced to incur undue transactions costs. High-volume, low-value trade and exchange is facilitated when consumers can trust the terms and conditions of trade without having to read them carefully every time.<sup>15</sup> Both sides of the transaction may prefer the government to step in to define certain

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<sup>14</sup> Kaplow and Shavell are careful to point out that their notion of welfare incorporates all dimensions of well-being and is distinct from a simpler “wealth maximisation” which ignores distributive concerns.

<sup>15</sup> The Australian Consumer Law has recently been updated to include a prohibition on unfair contract terms. The explanatory memorandum explicitly notes that, due to transactions costs, consumers and small businesses must rely on “standard form contracts”, so the terms and conditions in those contracts should reasonably reflect what is fair (i.e., which reflects the contract they would have negotiated if they could have costlessly negotiated in advance).

standard or minimum terms and conditions of trade so that consumers can trust that they are dealing on fair terms and conditions without detailed verification for themselves.<sup>16</sup> Overall economic welfare can therefore be improved if governments intervene in these types of transactions to ensure minimal standards in the terms and conditions of trade.

A full survey of the link between unfair practices and economic welfare is beyond the scope of this note. The fundamental point is that the economic approach to public policy requires that, before discussing options to address unfair trade practices, we must spell out the market failure and its link with economic welfare. This has several advantages: it allows us to define concepts such as “unfair terms” (in this case, terms that the parties would not have agreed to if they could have negotiated costlessly in advance); it allows us to define the scope of the problem (restricting attention to high-volume, low-value transactions – essentially the domain of consumer law); and it allows us to identify the full range of options for addressing the harm (such as consumer education, warning labels, etc.). Spelling out the framework in this way facilitates transparency and improves the quality of the ultimate public policy decision.

The European Union has linked the occurrence of unfair trading practices with the presence of “significant imbalances of bargaining power”. [EU Directive 2019/633](#) of 17 April 2019 deals with imbalances of bargaining power between suppliers and large buyers in the agricultural food chain. These imbalances of bargaining power are said to have a “negative impact on the living standards of the agricultural community”.

But, like concepts of unfairness, imbalances of bargaining power are not a recognised source of market failure. In the economic approach to public policy it is not sufficient to merely observe the presence of an “imbalance of bargaining power” – we must show how that leads to a reduction in economic welfare.

Perhaps imbalance of bargaining power merely reflects the presence of market power; perhaps it’s just a different name for an existing concept? But if so, this should be spelled out.<sup>17</sup>

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<sup>16</sup> Smith, Rhonda L. “When competition is not enough: consumer protection.” *Australian Economic Papers* 39.4 (2000): 408-425.

<sup>17</sup> Does it make sense to use a new term to describe an old concept? The risk here is that the use of a new term suggests that something new is intended (after all, if it is the same as market power, why use a new term?). If it differs from market power, how exactly does it differ? Is there a different link with economic welfare? Is there a different set of tools and options for addressing that market power?

As with the notion of “unfairness”, it may be possible to develop a coherent economic theory of imbalance of bargaining power. For example, an imbalance of bargaining power might be said to arise in a context in which one party is “locked in” to transacting with another party (that is, where one party has made a sunk investment which is specific to trading with a particular partner). In this case the other party can change the terms and conditions of trade leaving the first party worse off than if they had not engaged in trade at all. This could give rise to an economic harm – the fear of being in this position could have a chilling effect on valuable investment needed to establish the trading relationship.

Spelling out such a theory would be valuable. It allows us to define what we mean by an “imbalance of bargaining power” and to identify when it arises.<sup>18</sup> It also allows us to make predictions such as the observation that where the party with bargaining power is trying to grow its business, it may have an incen-

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<sup>18</sup> Specifically, we see that being “locked in” is an essential element, and that there must have been no reasonable opportunity to control this threat of hold-up in other ways (such as through a commercial contract).

tive to refrain from exercising this bargaining power as doing so would deter investment by new trading partners.

Again, this short note is not the place to set out a complete theory of imbalance of bargaining power. Rather, the key point here is that good public policy practice *requires* that we set out such a theory as the first step in the process of deciding whether and, if so how, to impose regulatory obligations.

## Conclusion

Regulators and competition authorities are not routinely viewed as public policy agencies. But the economic approach to public policy remains fundamentally relevant. There are always opportunities for discretion in how we interpret and enforce the law and, in any case, most regulatory and competition authorities have a role in providing advice and advocacy on changes to the law.

In all this activity we should maintain the public policy perspective – that is, we should be clear about the underlying market failure we are addressing, and how that market failure affects economic welfare. The three-step process is an important discipline on our thinking, and a key input to the quality of our decision-making.

## The latest academic thinking – From the Journals

Who has time to scan the journals to find relevant papers, let alone to read all that material? The aim of this section is to do some of the hard work for you.

Specifically, we have identified recent articles in the economics literature, summarised the key messages, and sought to put the paper in the broader context, so that you can decide whether or not to read the paper in more detail yourself.

The focus here is on papers from different areas of economics which may be of relevance to readers of Network. This includes regulatory economics, competition economics, digital platforms, law and economics, energy economics, benchmarking, and empirical techniques.

Inclusion in this list does not imply endorsement of the conclusions. Where appropriate we will offer our own critique. Readers are encouraged to read the original papers to form their own view.

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### Competition Policy

Since at least the time of Schumpeter, economists have made the argument that the primary determinant of economic welfare in the long run is the rate of innovation and growth in productivity. Yet, historically competition policy analysis has tended to focus almost exclusively on short-term allocative and productive efficiency effects. Is there a need to change the economic paradigm employed by competition authorities?

David Teece is one of the world's most cited authorities on the economics of entrepreneurship, innovation, and corporate strategy. In **Teece (2021)** he advocates for an overhaul in the way we think about competition policy analysis.

Teece laments what he sees as a failure of modern microeconomic theory – the lack of a coherent theory of innovation. He writes:

Unfortunately, microeconomic theory ... affords little room for incorporating technological innovation. ... When considered by Chicagoans and post-Chicagoans alike, R&D and investments in innovation were just costs with uncertain benefits. Efficiency, not innovation and growth, was seen as the pathway for the business enterprise to maintain competitiveness and deliver benefits for consumers. The standard tools of microeconomics under perfect or oligopolistic competition were often employed. Firms were viewed rather primitively as 'production functions'. Along the way, Robert Bork urged the antitrust community to

use the model of perfect competition 'as a guide to reasoning about actual markets' and to illustrate allocate efficiency.

Economic theory has developed much more sophisticated models of static competition and equilibrium than it has models of dynamic competition and innovation. As a result, the pressure for greater rigour in analysis has only increased the emphasis on static equilibrium models and has downplayed innovation considerations, to the detriment of competition law enforcement.

Can we link innovation to market structure and competition? Teece argues that the potential for innovation and change are not necessarily linked to market structure. A firm's ability to innovate is more likely to depend on its entrepreneurial capabilities than its size in the market. Incumbency and size is just as likely to be a source of disadvantage as advantage.

When it comes to potential competition, antitrust agencies typically look at the potential for firms in other markets or industries to repurpose assets to offer substitutes in the market in question. But, Teece argues, this is potentially misleading as much new entry is "indirect":

The dominant mode of competitive attack consists in supplying differentiated products, complements, or new combinations. In particular, competitive pressure might be exercised by products relying on different technological infrastructures, or supported by distinct business models, or supplied through specialised vendors. Head-to-head entry with very similar products is often difficult, or even completely unwise. Non-rival competition is the rule, not the exception.

For Teece, competition authorities should look beyond the short-term time horizon and envisage a range of products that may gain traction. Agencies should look at technological 'peers' and the disciplinary effect of their R&D programs. Rather than look at individual markets, competition should be assessed at the level of the entire ecosystem. A merger/acquisition should be assessed based on whether it improves the health or robustness of the ecosystem "by augmenting the business/ technology/ skillset of another ecosystem member/participant". Distinctions between vertical and horizontal markets are not as significant as complementors can also become competitors.

The latter part of this paper discusses the Facebook acquisition of Giphy. Teece argues that Giphy had not yet established a sustainable business model, and, absent the acquisition by Facebook, it would

likely have failed and its future innovations would have been lost. Teece sees Giphy as strengthening the Facebook ecosystem rather than eliminating a potential competitor.

Teece's reminder of the importance of innovation for long-run welfare is welcome. But, in the opinion of this reviewer, the drawback of this paper is that it does not articulate a model linking market power and dominance to investment and innovation. Does market power help or hurt innovation? In some circumstances it may hurt: for example, if market power allows a dominant firm to capture rents earned by its trading partners, then market power might hinder investment and innovation upstream or downstream. Teece does not articulate such a theory.

Teece advocates paying primary attention to the strategic capabilities and entrepreneurship of different firms. But it is not clear that there is any link between such capabilities and market power as it is traditionally understood. At the least, the policies advocated by Teece would lead to quite a different approach to competition policy. It is not clear what mergers would be blocked on the grounds of hampering innovation. We are left with the feeling that a competition policy which placed primary emphasis on dynamic competition and innovation would be very *laissez faire* or would amount to no competition policy at all.

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In August 2021, the former Chair of the ACCC, Rod Sims, gave a speech advocating for reform of the merger rules in Australia. A former Commissioner and former Chair of the ACCC recently published a response in the Australian Business Law Review.

**Cao, King and Samuel (2022)** review the reforms to the merger rules proposed by the ACCC: (a) the introduction of a formal notification regime for mergers, a greater focus on structural conditions, (b) a new deeming provision (that mergers where one party has substantial market power and that market power would be entrenched or extended would lessen competition) and (c) allowing agreements between the merging parties to be taken into account. In addition, the ACCC is proposing new rules for digital platforms, including a lower notification threshold to prevent the acquisition of nascent competitors, a lower threshold for the probability of competitive harm, a reversal of the onus of proof, and/or a rule to prevent certain digital platforms to acquire businesses in certain related markets.

The authors point out that, of the hundreds of mergers that go through the informal clearance process each year, very few are contested. There have been only 14 contested mergers since 1974. In only one of these mergers was the ACCC successful before the Courts or the Tribunal. In that case the merger par-

ties admitted guilt, avoiding a lengthy and expensive court case.

Why is the ACCC's success rate in merger litigation so low? The authors suggest that this is due to a tendency to rely on theoretical arguments and economic evidence. In contrast, the authors argue, the courts are looking for arguments based on "commercial reality" and assert that competition operates in a

"living commercial setting whose actors operate upon conjectures and predictions that may prove to be wholly or partly incorrect and that may be, from an economist's perspective, irrational" (quoting French J in the AGL-Loy Yang decision).

The Tribunal has made similar comments, noting in the Tabcorp-Tatts Group acquisition that the ACCC's theories of harm were purely speculative. The authors also identify other issues, such as problems with expert witnesses and the changing situation in the market between the time of the ACCC's original decision and the hearing. The authors conclude:

The losses suffered by the ACCC turned on fundamental factual findings rather than on any interpretation or application of the substantive merger laws. This should be borne in mind when considering the rationale for and effectiveness of the ACCC's proposed reforms to the merger framework.

The remainder of the paper critiques the ACCC's proposed merger reforms. The authors argue against an increased focus on market structure and market concentration measures, on the grounds that there is no clear relationship between market structure and "competitive intensity". The authors suggest that the ACCC could be stricter in its application of the informal clearance process, declining to clear mergers where the parties do not respond in a timely manner to information requests, forcing the parties to seek formal clearance or to take the risk of completing the acquisition without clearance.

The authors are sceptical of notification thresholds and of the merits of changing the definition of "likely". Regarding the role of the counterfactual in the legal decisions, the authors are critical of the "confused and two-step situation in Australia". They recommend that the ACCC should reject the Federal Court's approach in Metcash, in favour of the approach used in New Zealand. But they propose that this change should be achieved by pursuing matters through the courts, rather than amendment to the legislation.

The authors are critical of the use of deeming provisions based on structural measures which change the burden of proof and oppose the proposal to have sector-specific merger rules for digital platforms. This paper is an interesting summary of the outcomes in



five decades of contested mergers in Australia. The discussion of the merits of the various reform proposals are useful to the debate started by the ACCC about the need for merger reform and possible reform proposals.

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Elyse Dorsey is a partner in a Washington, DC law firm and an Adjunct Professor at the George Mason Law School. She is a frequent contributor to the literature on antitrust policy.

In a recent article **Dorsey (2022)** addresses the link between the level of competition in the economy and the overall income distribution. Could the (alleged) decline in antitrust enforcement over the past few decades be responsible, at least in part, for the observed increase in income inequality?

Antitrust policy could affect income distribution in several ways – first, a conventional monopolist might raise prices for the goods and services purchased by consumers, reducing their purchasing power. Similarly, a conventional monopsonist might lower prices for key inputs such as labour. Finally, the exercise of market power might enrich the owners of the firm with market power. The overall impact on the wealth distribution depends on the relative wealth of the customers of the firm, the suppliers of labour to the firm, and the owners of the firm. But under realistic assumptions (e.g., if we assume that firm owners are richer on average than labour suppliers or consumers), these effects could reasonably be expected to increase income inequality.

Dorsey's paper is in two parts. The first is a review of the literature on income distribution. This section shows that wealth and income inequality has been increasing for decades, especially due to an increase in the wealth and income of the very highest earners – the top 0.1%. This change could be due to a number of factors, including the change in income tax policy. The key question is: to what extent is antitrust enforcement a factor?

The second part of the paper surveys the history of antitrust enforcement and the literature on the link between market power and income inequality. Dorsey quotes from a paper by the Competition Division of the OECD which observes:

Market power may contribute substantially to wealth inequality, augmenting wealth of the richest 10% of the population by 12% to 21% for an average country in the sample. ... Market power may also depress the income of the poorest 20% of the population between 14% and 19% for an average country in the sample.

But this analysis does not distinguish between lawful (or government-created) market power and unlawful market power. It may be that this income inequality merely represents the legitimate reward to successful risk taking by entrepreneurs.

More tellingly, other analysis suggests that antitrust law enforcement has little effect on income distribution. Dorsey observes that the share of income held by the top 0.1% declined dramatically in the first half of the 20<sup>th</sup> century in France, the UK and the US – well before France and the UK implemented a modern competition law. Antitrust law cannot be responsible for this effect. Overall Dorsey's analysis suggests "a skeptical picture of antitrust law's ability to drive ... income inequality trends".

Dorsey's paper is long and detailed. At the end of the day, whether or not antitrust law enforcement has a measurable impact on income inequality does not diminish the importance of competition law. While competition law decisions certainly can have impacts on the income and wealth distribution, it is not primarily about those impacts – it is primarily about creating the conditions for economic growth and welfare. As Dorsey observes:

... the fundamental notion undergirding competition (and competition laws) is that competitive environments create growth—they make the pie bigger, so to speak. It is not that all growth necessarily occurs equally at all moments; but rather that over time, it is likely to improve welfare overall.

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In 2010 the French competition authority approved the merger of the broadcasting services of three TV channels (two purchased channels, NT1 and TMC, and the main channel of their purchaser TF1) but *de facto* prohibited the merger of their advertising sales services via a behavioural remedy which required that the advertising sales houses (ASHs) of NT1 and TMC remain separate from TF1.

The decision is analysed in a recent paper by **Ivaldi and Zhang (2022)**. The authors challenge the decision by the French competition authority, showing that the authority ignored the two-sided nature of the French digital TV market and hence could have reached a wrong conclusion regarding the welfare effect of the merger and the behavioural remedy.

Using a comprehensive *ex post* data set two years pre-acquisition and three years post-acquisition, the paper shows that: a) advertising has significant negative externalities on TV viewers; b) the merger improved the broadcasting qualities of merging channels; and c) the merging channels' equilibrium amounts and prices of advertising both increased. The paper explains that the increased equilibrium

amount of advertising was due to the behaviour of the Cournot-type ASHs of the merging TV channels.

The ASHs adjust the amount of advertising according to the quality of the TV program and the sensitivity of viewers to the amount of advertising, and both b) and c) have a positive impact on the ASHs' equilibrium amount of advertising. However, the ASHs have an offsetting incentive to restrict the total amount of advertising slots on the merging channels and thereby increasing their prices, in response to the increase in advertisers' willingness to pay for the advertising slots of the merging channels. The paper's simulated results show an increase in both the amounts and the prices of advertising of the three merging channels.

According to welfare analysis, the total surplus of TV viewers decreased post-acquisition, due to the detrimental effects of the increase in the amount of advertising outweighing the positive effects of the increase in broadcasting quality on the viewers' surplus. The paper concludes that overall, the approved merger harms both viewers and advertisers but benefits the TV stations, which contradicts the French authority's intention of improving the broadcasting of the merging channels without generating detrimental effects for the advertising market.

This paper's analysis has interesting implications for assessing mergers in two-sided markets, as it suggests that ignoring the interaction between the two sides of the market can result in unexpected outcomes.

## Energy Markets

Ahmad Faruqi is one of the legends of retail electricity pricing. He retired last year after four decades of involvement at the core of debates over electric utility "rate design" in the US. He has summarised his learnings over his career in a recent paper in the *Electricity Journal*.

Faruqi (2022) sets out ten lessons in rate design. The first is "Design rates based on cost causation". This is "the surest way to enhance economic efficiency and minimize cost shifts between customers". Lesson 2 is "Engage with stakeholders early in the rate design process". Lesson 3 is "Design customer-centric rates". If rates don't appeal to customers they won't take them. Lesson 4 is "Market the new rates" – through advertising and media campaigns.

Lesson 5 is "Test the new rates through pilot programs". Lesson 6 is "Pick the deployment strategy" – that is, whether the new rates are "opt-in", "opt-out", or mandatory. Lesson 7 is to "Seek a settlement with stakeholders". In other words, seek to reach an agreed or negotiated outcome rather than relying on a decision of the regulator.

The last few lessons relate to issues in the transition. Lesson 8 is "It's mostly politics" meaning that, since new rate designs are likely to lead to winners and losers, politicians can be reluctant to make any changes at all. Lesson 9 is "It's virtually impossible to please everyone". Any change is likely to create winners and losers, and the losers will complain more loudly than the winners. Lastly, lesson 10 is "Everyone is an expert on rate design". Everyone buys electricity and has a view on how it should be priced.

Faruqi concludes:

"As we move toward decarbonization via distributed energy resources and electrification, there will be a need to revise existing rate designs. Be conscious of these ten lessons when requesting rate revisions before regulatory bodies."

In drawing out the lessons for Australia, it is important to keep in mind that we have a competitive retail sector. Regulators do not directly set retail electricity tariffs. Retailers are free to determine their own tariff structures and to market those structures to small businesses and consumers. In Australia, the regulator's discretion is limited to the setting of the network tariffs – but those tariffs can still have a major impact on the structure of retail tariffs, as we have seen in the retail electricity market to date.

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One of the longstanding issues faced by market designers and competition enforcers is the question of the appropriate level of information disclosure. On the one hand, some degree of transparency is essential to facilitate the price-formation process. But too much transparency can facilitate coordination and collusion.

This issue is addressed in a key recent paper by **Brown and Eckert (2022)**. In the Alberta wholesale spot electricity market, the spot market operates every hour. De-identified offer information is published very soon after the dispatch process completes, at the start of each hour. In 2013, Alberta's Market Surveillance Authority (MSA) alleged that generating firms were identifying themselves through 'tagging' of their offers and were using their offers to communicate their pricing intentions. But generators identifying themselves in their offers is not necessarily evidence of collusion – it could simply reflect the desire of the firms to easily identify their own bids in the publicly-released data.

One way to assess whether or not this pricing behaviour constitutes collusion is to look at whether or not the firms involved are choosing prices that maximise their own short-run profits. If not, there is at least some suggestion that the firms must be colluding.

The authors focus on four large generating firms in Alberta's wholesale market. They find evidence that

the two largest firms were not maximising their own short-run profits. Both could have increased their expected profits by unilaterally deviating from their actual bids. The authors find that one firm (Capital Power) could have increased its expected profit by an average of 14 per cent. In addition, the authors find that this firm had a fairly simple deviation strategy which would have increased its profits. This is fairly strong evidence for the existence of collusion. In the case of the two smaller firms – who did not use the distinctive pricing pattern – the authors find no evidence of deviation from individual profit-maximising behaviour.

The authors summarise their approach as follows:

We develop a non-cooperative Cournot-Nash equilibrium benchmark model to evaluate if the firms' expected profits are higher under the observed offer behaviour. We find that observed behaviour closely tracks the Cournot-Nash benchmark in the low demand hours. However, on days where Capital Power employs its tagging pattern and on high demand hours, we find that the firms' expected profits are often considerably above the level that would be achieved if they behaved according to the Cournot-Nash equilibrium benchmark.

These are important results and raise important questions about the degree of information disclosure that should be allowed in concentrated electricity markets where firms interact repeatedly. But further questions remain: Is it better to allow frequent, timely disclosure, but at a higher level of aggregation? Or is it preferable to allow detailed, accurate disclosure, but only after a significant delay? Let's hope further research can answer these questions.

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In the context of wholesale electricity markets, the costs of congestion and losses on the underlying networks play the same role as "transportation costs" in other sectors, giving rise to different prices at different locations. In the presence of network losses and congestion, the price for electricity at one location can be quite different to the price of electricity at another.

These inter-location price differences have consequences for trading in the forward or hedge markets. Generators and large loads typically prefer to reduce the risk they face by trading in hedge contracts (and, in some cases, may be required to hold such contracts as a condition for obtaining financing).

Generators and loads at the same pricing location face an equal-and-opposite exposure to the spot price and can trade hedge contracts with each other that offset the risk they face. But not all generators and loads are located at the same location. If they

are to fully mitigate the risks they face, some market participant will not be able to find a counterparty at the same location and so will have to trade across two differently-priced locations on the network. This gives rise to a form of "locational basis risk" – the risk of price differences arising between the two locations.

To mitigate the basis risk most liberalised wholesale electricity markets make available to market participants a financial instrument known as a fixed-volume Financial Transmission Right (FTR). This instrument has a payout equal to the price difference between two locations multiplied by a fixed quantity.

But many market participants are not interested in trading a fixed volume of electricity. For example, wind generators have a volume of production that varies with the wind speed. In earlier work, **Biggar and Hesamzadeh (2021)** point out that fixed-volume FTRs are not a good hedging instrument for market participants who want to hedge a variable volume, such as wind generators. Instead, these authors propose the introduction of an FTR whose volume varies with the wind speed.

This issue is taken up in a recent paper by **Kim et al (2022)**. The authors hypothesize that basis risk is likely to be a larger issue for wind generators than for other generators, as they are more likely to be located in remote locations, far from major load centres, and because the output of wind generators is highly correlated, leading to congestion on the transmission network precisely when the wind farm is producing near its maximum. Furthermore, the authors hypothesize that the traditional fixed-volume FTRs will be an imperfect hedge for the output of these wind farms.

The authors use data on the prices and production of different types of generators in wholesale power markets in the central part of the USA (the regions known as ERCOT, SPP and MISO). They define the "basis" as the difference between the generator's local price and the price at the nearest "trading hub" (they choose 3 in each region, 9 in total). The authors show that the average "basis" (that is, the average price difference to the local trading hub) is a "far larger issue" for wind generators than for thermal generators. In addition, the authors show that the uncertainty in the basis is highest for wind in SPP and MISO (whereas in ERCOT, the basis risk is on a par with gas-fired generation).

When it comes to the effect of FTRs the authors observe:

It is not surprising to find that the payout of an annual fixed-volume FTR eliminates the basis for generators whose production is nearly constant, such as a coal plant, since the payout of the FTR is, by design, nearly equal to the generation-weighted basis faced by the plant. On the other

hand, the payout of the fixed-volume FTR does not match the generation-weighted basis of a wind plant, whose volume varies significantly throughout the year depending on the weather.

The authors conclude:

The introduction of a suite of more flexible FTR products that more closely match the energy profile of different generation types, where a wind FTR is one of the possible variants, could help to level the playing field among market participants. This would better-enable FTRs to achieve their two primary objectives of (1) promoting inter-temporal forward contracting by reducing risk for market participants, and (2) efficiently distributing congestion rent by narrowing the gap between the congestion rent incurred by physical market participants and the FTR payout to financial market participants.

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At the core of the Australian National Electricity Market, is a market process run by AEMO, which determines wholesale spot prices for energy and reserves (known in Australia as Frequency Control Ancillary Services or FCAS) every five minutes. In the EU, the integration of the national electricity systems into a continent-wide power market has given rise to the need for a similar short-term power market. This is known as a “balancing market”. The question arises as to whether there is *also* a need for a corresponding short-term market for *reserves*.

This is the subject of a recent paper by **Papavasiliou (2020)**. Papavasiliou is a graduate of UC Berkeley and has, until recently been working as an academic in Belgium, with the Belgian energy regulator and the Belgian transmission system operator.

His central claim is that there should be a short-term market for procurement of reserve capacity (which we in Australia would call FCAS). Moreover, he proposes that the volume procured in this market should be price-responsive, using the concept of the Operating Reserve Demand Curve (ORDC) introduced by **Hogan (2013)**.

In an energy-only electricity market, occasional price spikes can be necessary to ensure incentives for investment in peaking generator capacity. This is especially the case in a market dominated by intermittent renewable generators, where those price spikes likely correspond to times when the wind is not blowing. In such a market, investment in some generation capacity may rely on forecasts of prices which are unpredictable and may only occur a few times a year.

Papavasiliou recommends a scheme in which the volume of reserve procured diminishes as the price increases. His objective is to reduce the volatility of

prices in the market for reserves. Since the price of energy and reserves is related (“co-optimised”) this also has the effect of reducing the volatility of the energy price. Papavasiliou asserts that this improves the overall environment for investment.

Papavasiliou’s approach still relies primarily on price signals, including high prices at peak times – which he refers to as “scarcity pricing”. He asserts that this primary reliance on prices is not incompatible with the implementation of a capacity market:

The dilemma between capacity markets and scarcity pricing is false: scarcity pricing does not preclude capacity remuneration mechanisms. It is perfectly compatible with capacity remuneration mechanisms. Precedence, however, matters: before we proclaim the ‘energy-only’ market dead, let us give it an opportunity to function properly.

Papavasiliou’s proposals are, to a large extent focused on details in the European balancing market – details which are context specific, and not that relevant to policymakers in Australia. Nevertheless, this is a topical issue in the EU from one of the more important players and is worth a look.

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Paul Simshauser (former Director-General of the QLD Department of Energy and current CEO of Powerlink, the QLD TNSP) is one of the most prolific academic writers on issues involving the Australian National Electricity Market (NEM). In **Simshauser et al (2022)** he presents the results of modelling of investment in a “Renewable Energy Zone” in south-eastern Queensland.

The authors observe that some investors in variable renewable energy (VRE) in the NEM have faced a number of hurdles, such as:

- i) lengthy network connection delays, and in some instances, ii) sizeable post-entry network remediation costs due to rapidly deteriorating system strength. Some projects also experienced iii) acute production constraints during system strength remediation lags. Others still faced iv) plunging Marginal Loss Factors (i.e. the NEM’s locational multiplier on spot prices) in the post-entry environment. A small number of projects experienced all four of these entry frictions, leading to nontrivial asset write-downs.

Renewable Energy Zones (REZs) have been proposed as a way to overcome these hurdles – to encourage coordination in location decisions so as to achieve economies of scale in the network augmentation and strengthening required. Although REZs make a great deal of sense it remains necessary for the planning authorities to ‘move first’ and announce a REZ and make the necessary upgrades before the

full extent of demand for investment in the REZ is made clear. As the paper puts it there is a degree of faith put in “build it and they will come”.

The authors consider a model of a radial connection to a REZ in SE QLD with a line rating of 1500 MW. They consider different possible objectives for the REZ planner including (a) minimising total cost (the sum of transmission and generation); (b) maximising total output (which might be the objective of the seller of a PPA); and (c) maximising profitability.

In the first case considered the objective is minimising total cost (measured as “Levelised Cost of Energy”). The model suggests that it is optimal to install 1700 MW of wind and 350 MW of solar. This is a larger total capacity than the line rating, resulting in some curtailment.

In the second case the objective is maximising total output. In this case up to 3380 MW of wind and solar capacity is installed (in roughly equal amounts), but the amount of investment depends on the degree of tolerance of network congestion.

The authors note that in a market-based power system, investment should be on the basis of price signals and profitability. In this context, the profitability of VRE investment depends strongly on the degree of VRE penetration and its correlation. The paper points out that whereas historically there was a price premium for generation in the middle of the day, as the level of solar investment has increased, prices are now depressed in the middle of the day and after often negative. Nevertheless, the profit-maximising objective results in even higher levels of investment in this model than the “maximise output” objective.

The authors conclude that getting sufficient “foundation” commitments to a REZ will be important, but mechanisms will need to be developed to place bounds on and to allocate the costs of congestion. As they note: “At the time of writing, likely future economic levels of marginal VRE congestion are *not* well understood in the NEM”. In addition, due to the changing incentives for new investment over time as wholesale price signals change in response to new VRE investment, predicting the path of future investment will be a complex task.

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## Digital Platforms

Mobile devices have become an indispensable part of modern living. Google and Apple together provide the operating systems which are used in most mobile devices. For app developers, the only way to reach end-customers is through the App Stores provided by Google and Apple. In this sense Google and Apple are literally a gatekeeper in allowing app developers to reach their end-market.

Around the world, concerns have arisen that Google and Apple might mis-use their position in the app market – perhaps denying or delaying certain apps in getting to market (especially when they compete with Google or Apple’s own services), downgrading apps in search results, increasing the fees charged for the use of the App Store, copying successful apps, or requiring that apps make use of other Google or Apple services such as payment services.

Google and Apple want to provide access to a range of high-quality apps as a key part of the attraction of their mobile devices. Google and Apple created the app ecosystem precisely because it increases the value of their software (OS, Android) and hardware (mobile handsets and tablets).

In a rapidly growing market, where Google and Apple are competing vigorously to attract end-customers they have a strong incentive to attract app developers, to foster their investment in innovation, and to protect the rents that app developers can earn. When Apple created the App Store in 2008 “Steve Jobs announced that Apple did not intend to profit from it, and that all the money would be given to the developers”.

But what happens when the market stops growing rapidly? In this case, the strategy of the incumbent platforms may switch – from seeking to attract and retain complementors (app developers) to exploiting the sunk investments of the existing complementors or excluding them from the market entirely (“foreclosure”).

This switch in strategy has been observed in practice. **Rietveld et al. (2020)** examined changes in the governance rules of digital platforms. They found that while the platform was growing governance changes were aimed at improving market conditions for existing complementors, to deepen and broaden the complement pool. But as the platform became more dominant, changes were more often aimed at capturing value by the platform by expropriating complementors.

This effect has recently been explored in a theoretical paper by **Padilla et al (2022)**. The authors find that:

... when the growth of demand for the electronic device is healthy, foreclosure in the complementary market is less likely. It becomes more profitable as demand for devices becomes saturated, and the service offered by the device seller is not too inferior compared to the third-party competitors. In our model, foreclosure occurs at equilibrium as an optimal response of the device seller to a slowing down or a decline of its primary business. Under these conditions, foreclosing rivals from the complementary service market enables the device seller to monetize the user base ac-

quired in the first period. Consumers will lose out from foreclosure if the monopolist's service is inferior to those provided by third-party developers. Such harm is relatively more pronounced as demand for devices becomes saturated.

Importantly, in the absence of external regulatory controls, rational app developers will recognise this risk and will choose to under-invest in developing their apps when market saturation approaches. This leaves all parties worse off – the app developers, users and the platforms themselves. If the digital platforms could commit to not engage in foreclosure in the second period everyone could be better off. This is a classic time-inconsistency problem, which may not be able to be solved through conventional mechanisms (such as long-term contracts). If such mechanisms don't work, there can be a role for regulation: "Explicit regulatory constraints may therefore be required to protect consumers against the risk of hold-up".

The authors construct a simple two-period model. In the first period, the device manufacturer is seeking to attract users to its device and allows scope for a range of complementors (app developers). In the second period the device manufacturer can choose to foreclose the secondary market (and take all the sales of the complementary service itself) or allow the complementors to compete in providing the complementary service. They set out conditions under which it is profit-maximising for the device manufacturer to foreclose the other complementors in the second period. They conclude:

In this paper, we show that there can be significant consumer harm as a result of market abuse by gatekeeper platforms, and that such harm is more likely as markets for devices become saturated. This implies that, whatever the structure of future regulation, competition authorities will have to remain vigilant for potential abuses, including in apparently more mature markets.

This paper is valuable in highlighting the time-inconsistency problem. But the theoretical model used is quite stylized and ignores, amongst other things, the need for investment by the complementors. Nevertheless, it is a useful contribution.

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The application of competition policy to digital platforms has pushed competition enforcers around the world to re-think their frameworks. For example, the two-sided nature of many platforms raises challenges for traditional concepts of market definition and the application of concentration measures.

In particular, the application of competition policy to digital platforms has led many competition enforcers

to re-think the concept of market power. Many new terms have been suggested to capture forms of, or alternatives to, traditional market power, especially in the context of digital platforms. These terms include bargaining power, platform power, bottleneck power, gatekeepers, or "strategic market status". The ACCC in its own work has emphasised the central role of an imbalance of bargaining power between digital platforms and its business customers.

Do these terms describe something new or are they merely aspects of market power? Do we need new terms to describe the potential harm arising from the actions of digital platforms?

This issue is addressed in recent report **OECD (2022)**. This report looks at a range of terms that have been used to describe the special power possessed by dominant digital platforms – including terms such as "platform power", "intermediation power", "bottleneck power", "portfolio power", "gatekeepers" and "strategic market status". Many of these concepts are assessed by the authors as being equivalent to market power.

"Intermediation power" has been suggested to be a third form of market power. In an oligopoly market where access to a large volume of sales is necessary to remain an effective competitor, a trading partner which controls a large volume of sales is a "must-have trading partner" and can exercise a power similar to conventional market power.

The term "portfolio power" has been used in Europe to describe a situation where there is a merger between a firm with market power and another firm which is neither a direct competitor nor a direct trading partner. The concern is that the merged firm will be able to "leverage" its market power by tying or bundling products together. But such leveraging is only possible when the products are complementary. Products that are complementary are in a vertical relationship with one another even if there is not direct trading relationship between the two firms. Portfolio power therefore just seems to describe concerns with vertical mergers when one firm has conventional market power.

Is the term "gatekeeper" a narrower concept than traditional market power? In the EU Digital Markets Act the definition of a gatekeeper makes no reference to market power and is potentially an easier test to meet than the competition law concept of an essential facility. But the fundamental idea here seems to be a form of market power.

The authors also discuss the concept of a "superior bargaining position" or "economic dependence". The abuse of a superior bargaining position has been a feature of several east-Asian competition laws for some time. The concept of economic dependence is

a feature of several competition laws in western Europe. These concepts may have particular relevance in the context of digital platforms. But there is a fundamental question whether these ideas are distinct from traditional market power. The authors in OECD (2022) link these ideas to the concept of an “exploitative abuse”, which is a form of exercise of market power.

The authors conclude with a discussion as to why these new terms or concepts have been introduced into the discourse and legislation on competition policy for digital platforms. They suggest three reasons:

- The need to translate economic concepts into legal language requires greater clarity, specificity and certainty than the economic literature can provide.
- The new terminology is needed to address practical enforcement challenges, enhancing the speed and decisiveness of competition law enforcement.
- The traditional concepts of market power and dominance are too narrow to address the range of concerns that arise in digital markets.

The authors end up suggesting that these ideas can all be traced back to a concern with market power:

Even measures motivated by fairness, a concept likely to create discomfort among some economists, may ultimately be tied back to market power. After all, exploitative abuses are an attempt outside of sector regulation to address conditions imposed on consumers due to a firm’s market power (which reflects a lack of alternatives for said consumers). What is the policy concern about consumers getting an unfair deal from a bottleneck, gatekeeper, unavoidable trading partner, or source of economic dependence, if not an expression of concern about market power?

In the opinion of this reviewer, this assessment is largely correct – these new terms all reflect at their root, a concern with what we might call market power. However this concept of market power is different to the concept of “raising the price and reducing the quantity” which features in many textbooks. It is this difference which underlies the perceived need to create new terms and concepts.

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Readers of Network will be well aware that the pressure to regulate dominant digital platforms raises questions that go to the foundation of competition law and policy. **Varan (2022)** is a recent contribution to this debate from a legal perspective.

Aidee Varan is a lawyer at Clayton Utz and recent graduate of Curtin Law School. The paper starts with

a review of the likely effectiveness of Australian competition law as the primary control on digital platforms. Varan points to difficulties in enforcing section 46, difficulties in preventing acquisitions of nascent competitors, the slowness of competition law cases, and confusion in interpreting the object of competition law.

In the second part of the paper, Varan emphasises the importance of addressing what she calls the “theory” of competition law:

Until there is substantial engagement with the ideologies that currently impair competition enforcement tools, any attempts to revitalize competition law will fall short of the means necessary to address the market power problems associated with “big tech”. Despite increasing discussions about the role of theory in competition law overseas, the current literature and proposed law reform in Australia largely neglects consideration of any theory directly. In fact, the limited aspects of theory that are incorporated in Australia’s existing competition laws may have resulted indirectly from following US Supreme Court decisions (as opposed to any direct, intentional engagement with the theoretical basis for those decisions).

Varan distinguishes three economic schools of thought: The Harvard School, the Chicago School, and the Neo-Brandeis Movement. The Harvard School is described as being predominantly “structuralist” – looking at market structure as the driver of outcomes. It opposes mergers which concentrate a market regardless of the potential outcomes for business efficiency or for consumers. It has the benefit of simplifying enforcement and setting clear rules for business, but at the risk of preventing potentially efficiency-enhancing mergers.

According to Varan, the Chicago School abandons structural notions and instead focuses on the effect on allocative efficiency – in particular the impact on consumers – and tends to view market power as being essentially self-correcting. This approach has been criticised as neglecting the interests of other economic actors (“workers, suppliers, innovators, independent entrepreneurs and competitors”), who are said to be part of competition law’s traditional concerns. Varan sees the influence of the Chicago School in the current “substantial lessening of competition” test, which she contrasts with the historic test which focused on the ability to strengthen a dominant position.

For Varan, the “goldilocks” solution is found in the Neo-Brandeisian approach.

“The Neo-Brandeis movement posits that competition law and enforcement needs to focus on a broader set of measures to assess market power

as opposed to one specific outcome (such as consumer welfare). This includes consideration of suppliers, small businesses and workers. The Neo-Brandeis promotes re-focusing attention back to competitive structures and processes of competition to better align and comply with the legislative intent of major competition laws

Varan sees the Neo-Brandeisian approach as a middle ground between the Harvard and Chicago schools of thought. She notes that, unlike the Harvard School, the Neo-Brandeisian movement allows for the possibility that monopoly may deliver benefit to society, but unlike the Chicago approach, insists that the monopoly should be carefully regulated.

Varan recognises that the Neo-Brandeisian approach is new. “Without a canon of literature or any tangible political or judicial achievements, it is difficult to effectively assess the movement”.

While possible to have various schools existing at once, this means that Australia has an inconsistent theoretical approach. This reduces clarity and coherence of competition law and enforcement. Clearly, there is a strong case for re-conceptualising how Australia thinks about competition (and to redress issues stemming from the Chicago School’s influence). The Neo-Brandeis movement has the benefit of hindsight and can build on previous schools of thought to be adaptable to a modern environment

Varan applies the Neo-Brandeisian approach to digital platforms, noting the implications for divestiture (break up monopolies), mandated sharing of data, increased regulatory controls, and stricter control of mergers. Varan urges Courts and Tribunals to engage with the Neo-Brandeisian theory in, say, enforcement of predatory pricing. Varan also proposes mandatory M&A notification requirements, and mandation of data sharing. She proposes amending the objectives of the Competition Act to read:

The object of Part IV of this Act is to enhance competition (through promoting competitive market structures), concerned with protecting all market participants, including, but not limited to: consumers, producers, distributors, suppliers and innovators.

At the end of the day, Varan’s primary claim for the Neo-Brandeisian approach is that it is a middle ground between the Harvard and Chicago Schools. But this is not sufficient to improve clarity and coherence of competition law and enforcement that she seeks. Without a clear economic framework, broadening of the objectives to include the interests of producers, distributors, suppliers and innovators risks increasing the discretion of enforcers and reducing the predictability of competition law, without clear

gains to overall economic welfare. The theory of competition we need is something more than “not Harvard” and “not Chicago”, but an entire alternative framework which sets out what competition law is trying to achieve.

## Regulatory Policy

David Havyatt is a former advisor to Energy Consumers’ Australia and a PhD student at the University of Wollongong. During his time at ECA he was closely involved in the trial of a new mechanism for engaging consumers in the process of determining a regulatory reset of an electricity distribution business. In **Havyatt (2022)** he writes up this experience for the readership of *Utilities Policy*.

This paper starts with a discussion of the objectives of regulation and the role of consumers in achieving those objectives. The author notes that most public utility regulatory proceedings in the US involve consumer advocates acting as a counterparty to the views of the regulated firm. Public utility commissions in the US often actively encourage the parties to reach a mutually acceptable agreement or “negotiated settlement”.

The bulk of this paper describes the trial of customer negotiation carried out by AusNet as part of its five-yearly regulatory reset. This trial involved the creation of a “credible counterparty” to the negotiated business, known as the Customer Forum. The forum comprised five members of the public with a range of skills, chosen to represent the consumers in AusNet’s distribution area.

As part of the trial, AusNet and the Forum established an “Engagement Plan” setting out the frequency of meetings and the topics that would be discussed. The AER was closely involved throughout this process, providing support for the Forum, and providing guidance as to how it would treat issues in the formal reset process. The Forum engaged directly with AusNet’s consumers through local meetings and site visits. This led to recommendations as to how AusNet could improve its customer service policies. The Forum also recommended the creation of a new customer service incentive scheme. In its final determination the AER spoke approvingly of the NewReg process and its impact on the regulatory determination.

The second part of this paper discusses the experience with customer engagement by other electricity businesses in Australia, with a focus on the customer-engagement experience of Powerlink. The author also discusses the interaction between customer engagement, and incentive schemes in delivering efficient outcomes. The paper concludes:



The NewReg trial has led to a step-change in the AER's approach to consumer engagement and how consumers' responses to regulatory proposals through engagement can shape the acceptance of proposals. While negotiated settlement is not an applicable model outside the North American concept of a rate case, the experiments in Australia demonstrate the value of a network business seeking to reach an agreement that its revenue proposal needs to reflect consumer preferences.

This paper, in documenting the experience with customer engagement and customer negotiation in Australia, is a valuable addition to the literature on the role of customers in economic regulation.

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WACC issues are routinely amongst the most contentious in regulatory proceedings. **Romeijnders and Mulder (2022)** address the question of how the WACC should be set when it must be fixed for a period of time (for the five-year regulatory period, say), but the underlying market conditions are fluctuating. In this context should the WACC be set at the average or expected value of the WACC over the regulatory period? The authors observe that in choosing to set the WACC equal to the *average* or expected value regulators are implicitly assuming symmetric consequences from the regulated WACC being "too high" (resulting in regulated prices that are too high) or "too low" (resulting in under-investment and a potential reduction in service quality and/or reliability).

The authors use a model of regulation in which the regulator is only concerned with consumer welfare (not the more conventional total economic welfare). Specifically the regulator seeks to maximise the consumer surplus less the value of lost load from unsupplied electricity.

The authors assume that the network is made up of a set of assets with different ages. Older assets are less reliable (result in a higher expected loss of load). Within the regulatory period, the true cost of capital is assumed to be stochastic, while the regulated cost of capital is fixed (for the duration of the regulatory period). The regulated firm is assumed to not invest at all when the true cost of capital is above the regulatory cost of capital, and is assumed to invest a fraction  $\beta$  of the total assets when the true cost of capital is below the regulatory cost of capital. The result is a stochastic path of investment, and therefore asset ages, and therefore outages, with a different path of investment for every different sequence of realisations of the cost of capital.

The authors estimate the average effect of different WACC mark-ups using Monte Carlo simulation. Using their estimated values (calibrated to a distribution

network in the Netherlands), they suggest that the regulator should add a mark-up of about 1% to the expected value of WACC. The reason is, although the higher WACC leads to higher prices and lower consumer surplus, it also reduces the likelihood that the WACC is too low, leading to under-investment in the network. A regulated WACC that is close to the historic mean has a high risk of being too low *ex post*, potentially leading to periods of under-investment. A small increase in the regulated WACC reduces this risk significantly, while only leading to a small increase in consumer surplus.

These results do depend, to an extent, on the parameter values chosen. If the regulated firm can replace a large share of the assets in a year, it may not be necessary to add a mark-up to the regulated WACC (the investment drought in years when the WACC is "too low" can be offset by the large investment in the years when the WACC is "too high"). In fact, for large enough variability in the WACC, it may be optimal to set the regulated WACC at a discount to the expected value (all the needed investment can occur in the years when the actual WACC is low).

The basic conclusion of this paper (that the regulator should target a WACC above the expected value) is consistent with the practice of some regulators (e.g., New Zealand Commerce Commission).

This paper is an interesting read, but some questions remain. For example, the paper assumes that the regulated firm has discretion over the timing of investment; in practice this discretion is limited due to regulatory commitments, service standard obligations and incentive schemes. In addition, the paper assumes the regulated firm can observe the cost of capital with precision at all times. In practice a regulated firm is unlikely to know its precise cost of capital, particularly when it is primarily funded through equity and retained earnings. If the risk of intra-period variation in the WACC was large it could presumably be addressed through a simple mechanism such as a pass-through. It is not clear that this paper is the last word on WACC-premiums.

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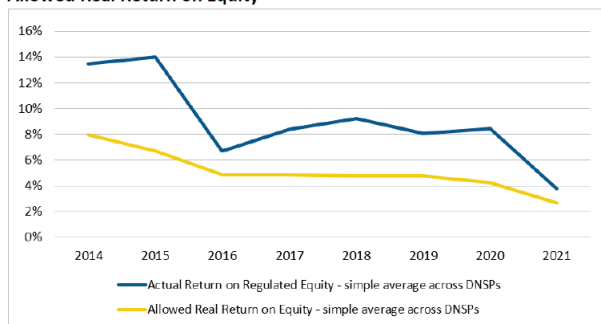
Regulated prices must be set *ex ante* – that is, on the basis of forecast expenditure and revenue, and using a forward-looking measure of the cost of capital. In principle, the allowed revenue should be set so that the regulated firm earns an out-turn return on capital that is *on average* equal to the required cost of capital. But, until recently regulators in Australia have not systematically looked back to determine whether the out-turn return is above or below the regulatory-allowed cost of capital.

This changed in September 2021 when the AER published its Electricity Network Performance Report,

subsequently updated in July 2022. The AER presented data showing that on average across the network businesses, each year since 2014, the out-turn return on equity has been higher than the regulatory-allowed return on equity. The AER’s results for distribution businesses are summarised in the table below.

The AER also breaks down the drivers of the difference, noting that it is mostly due to factors such as declines in interest rates, differences between forecast and out-turn gearing, payments under incentive schemes, and savings on capex and opex. (It should also be noted that these results are on average, across the NSPs; some NSPs have earned returns which fall below the expected return in individual years).

**Figure 3: Distribution Networks — Actual Return on Regulated Equity vs Allowed Real Return on Equity**



Source: AER data accompanying 2022 network performance report.<sup>44</sup>

This apparent systematic outperformance is the subject of a recent report by Institute for Energy Economics and Financial Analysis which received much press attention in Australia. In **IEEFA (2022)** Simon Orme (until recently a consultant with Sapere), explores the implications and drivers of these results.

The author first converts the out-performance figures (expressed as a return on equity) into dollar amounts, suggesting that the “supernormal profit” amounts to almost \$10 billion per annum (out of total network revenue of just over \$100 billion per annum), concluding that “consumers are being charged for network costs that do not exist”. He also argues that

On average, across all networks, 6.8% of unnecessary cost was added to customers’ bills through the impact of supernormal profits. The range was wide: from 0.2% for Essential Energy to 17.3% for United Energy.

The claims in this part of the report (e.g., “costs that do not exist”, “unnecessary cost”) are misleading?

Section 7 of the report addresses the question “why has the monopoly network economic regulation system failed?”. The author suggests that a key part of the problem is “the failure of the AER to develop and report on quantitative measures that would objectively assess how it is performing”. He also

points to a lack of transparency over outcomes, reliance on a “false corporate finance theory” and failure to take into account out-turn information in regulatory resets (especially in the cost of capital). The report calls for an independent commission of inquiry into the performance of regulators.

The report’s attention on ex post on actual financial outcomes is valuable. But in the opinion of this reviewer, it is not yet conclusive that the existing regulatory regime is failing, or that consumers will “overpay” in future.

For example, the current regulatory framework deliberately locks in an allowed revenue path every five years – in order to strengthen incentives for efficiency. But this means that changes in outcomes from the forecasts that occur during the regulatory period will lead to an out-turn return which is higher or lower than expected. Over the period of this study there were factors leading to lower than expected expenditure, and so higher-than-forecast returns, such as the decline in demand for electricity in the period 2010-2015 and the decline in interest rates from 2015-2020. If these situations were reversed, presumably we would have observed out-turn returns lower than forecast.

It is possible that the regulated businesses have been able to “game” the regulatory system (for example, by inflating forecasts of expenditure, to increase the reward for making ‘cost savings’, or by arguing for policies, such as the trailing-average approach to debt, which take advantage of broader market trends). But, some of these effects are a natural consequence of the decision to rely on incentives. In the presence of asymmetric information, an attempt to rely on incentives to achieve efficiencies is likely to open the door to a degree of gaming which would likely be manifest in higher-than-expected ex post returns. These cannot necessarily be eliminated without undermining the incentives for efficiency in the first place. This is the “rent-efficiency trade-off”.

The report fairly asks: if there is a rent-efficiency trade-off, where are the efficiency gains we should be seeing? This raises broader questions about benchmarking and performance measurement. If it were possible to easily measure the performance of a regulator it wouldn’t be done by an independent decision-making body – the task could be prescribed in a carefully designed contract.

The value of this report is that it re-opens a debate on ex post performance assessment of regulatory frameworks. In my view there is more to be said.

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### Editorial Note

Do you have a short paper that would be of interest to the readership of Network? This could be thinking on topical policy issues, reflections on recent policy decisions, a discussion of new academic ideas, or a report on research your team has carried out.

This is an opportunity for both senior, experienced staff and for more junior and less experienced staff who would like to build their profile.

The topic should be within the broad field of regulatory and competition policy. The articles should be relatively short: 1000-2000 words is ideal. If you have an idea that you would like to check out with the editors feel free to get in contact with us. We look forward to hearing from you.

In addition, if you have an announcement that would be of interest to the readership of Network, such as announcements about upcoming training courses, or key vacancies, openings or opportunities, please let us know and we'll include the announcement in future editions

## Regulatory Decisions in Australia and New Zealand

### Australia

#### Australian Competition and Consumer Commission (ACCC)

##### NBN Co Submits Revised Special Access Undertaking Variation

On 30 November 2022 the ACCC published NBN Co's revised proposed variation to its Special Access Undertaking, a key part of the regulation of the NBN. A consultation paper is anticipated in early 2023, in relation to NBN Co's proposal.

##### Proposed Price Increase for Post

On 11 November 2022 the ACCC announced it does not object Australia Post's draft proposal to increase the price of its reserved ordinary letter service, to be implemented in January 2023.

##### Digital Platform Services Inquiry 2020-2025 – Issues Paper

On 11 November 2022 the ACCC announced that it has brought proceedings against three of Australia's largest internet providers for making false or misleading representations to consumers when promoting certain NBN internet plans.

##### Digital Platform Services Inquiry – Fifth Report

On 11 November 2022 the ACCC released its fifth report of the ACCC's five-year Digital Platform Services Inquiry.

##### Improved Murray-Darling Basin Water Availability

On 28 October 2022 the ACCC reported that improved rainfall across most parts of the Murray-Darling Basin in 2020-21 led to widespread increases in water storage volumes and allocations.

##### Announcement of Additional Responsibilities for the ACCC

On 26 October 2022 the ACCC announced the Federal Government's new work for the ACCC in water trading and an extension of the ACCC's gas inquiry role.

##### Plan to Legislate New Functions for ACCC

On 14 October 2022 the ACCC announced the Australian Government's plan to legislate new functions

for the ACCC as the water market conduct regulator in the Murray-Darling Basin.

##### Identifying Misleading Environmental Claims

On 4 October 2022 the ACCC announced it had launched two internet sweeps to identify misleading environmental and sustainability marketing claims and fake or misleading online business reviews.

##### Proposed Regional Mobile Network Arrangements – Statement of Preliminary Views

On 30 September 2022 the ACCC released a statement of preliminary views on the authorisation sought by Telstra and TPG for their proposed regional mobile network arrangements. A Decision by the ACCC is expected on 2 December 2022.

#### Australian Competition Tribunal (ACT)

No reportable matters listed.

#### Australian Energy Market Commission (AEMC)

##### Frequency Operating Standards – Draft Determination

On 1 December 2022 the AEMC announced it will hold a public forum for the Review of Frequency operating standard, which will follow the 8 December 2022 publication of the Draft Determination.

##### Future Metering Review – Recommendation

On 3 November 2022 the AEMC announced its recommendation for the future uptake of smart meters.

##### Residential Electricity Price Trends – Report

On 1 December 2022 the AEMC announced that it will publish its next Residential Electricity Price Trends report in mid-2023.

##### Rules Recommended for Hydrogen and Renewable Gases

On 24 November 2022 the AEMC made recommendations for rules in the hydrogen and renewable gas industry.

##### Fiscal Protection for Electricity Customers – Final Determination

On 17 November 2022 the AEMC released its Final Determination and Final Rule aimed at better protecting electricity customers from future major supply shortfalls.

## Future Metering Review – Recommendation

On 3 November 2022 the AEMC announced its recommendation for the future uptake of smart meters.

## Network Infrastructure Project Costs Rule Change – Final Determination

On 27 October 2022 the AEMC published its Final Determination and Final Rule for the Material Change in Network Infrastructure Project Costs Rule Change.

## Regulatory Framework – Final Report

On 27 October 2022 the AEMC released its Final Report on the national transmission framework.

## AEMO Participant Fees – Final Rule

On 20 October 2022 the AEMC announced its Final Rule, on transmission network service providers recovering participant fees, would commence 27 October 2022.

## Failed Energy Retailer Contracts – Review

On 13 October 2022 the AEMC announced a review is underway to investigate whether changes should be made to the Retailer of Last Resort scheme to protect customers in the event that a retailer goes out of business.

## Australian Energy Market Operator (AEMO)

### South Australia's Disconnection from the National Electricity Market

On 16 November 2022 the AEMO released a media statement concerning South Australia's disconnection from the National Electricity Market on Saturday 12 November 2022.

### Launch of World-first Generation Connections Tool

On 16 November 2022 the AEMO announced the launch of its world-first 'Connections Simulation Tool', enabling eligible users to run simulation studies against AEMO's power system model.

### Victoria's Electricity Transmission Network – Report

On 28 October 2022 the AEMO announced it has published the 2022 Victorian Annual Planning Report for the state's electricity transmission network.

### AEMO Completes Procurement for Victorian Government

On 27 October 2022 the AEMO announced it has completed the procurement process on behalf of the Victorian Government for several stage one pro-

jects outlined in its Renewable Energy Zone Development Plan.

## Quarterly Energy Dynamics Report for Q3 2022

On 27 October 2022 the AEMO released its report on the national energy market for the 'record-setting' third quarter, to end-September 2022.

## Australian Energy Regulator (AER)

### Extended Access Arrangements for Victorian Gas Distributors – Final Decision

On 23 November 2022 the AER published its final decision on the extension of access arrangements for Victorian gas distributors AusNet, AGN and MGN from 1 January to 30 June 2023.

### Early Signal Pathway for January 2024 Regulatory Proposals – Expressions of Interest

On 18 November 2022 the AER announced it was seeking Expressions of Interest (EOI) from network businesses with regulatory proposals due in January 2024, for the Better Resets Handbook - Towards consumer-centric network proposals. Submissions are required by 6 December 2022.

### Incentivising and Measuring Export Service Performance – Draft Report

On 18 November 2022 the AER released its Draft Report on regulatory arrangements for electricity export service performance. Submissions are required by 30 January 2023.

### Wholesale Markets Quarterly for 'Historic' June Quarter

On 16 November 2022 the AER released its latest Wholesale Markets Quarterly for the wholesale gas and electricity markets from July to September 2022.

### Rate of Return Instrument Delayed

On 14 November 2022 the AER announced it has decided to delay the publication of the 2022 Rate of Return Instrument until February 2023. Publication of the new instrument is expected in February 2023.

### Compliance Update On Essential System Services

On 4 November 2022 the AER released a compliance update for the transmission businesses that provide vital inertia network services and system strength services to keep national electricity grid in a safe and stable operating state.

## 2023–24 Default Market Offer Determination – Issues Paper

On 3 November 2022 the AER released an **issues paper** on the 2023-24 Default Market Offer (DMO) price determination for consultation. A draft will be released in early 2023, and the final DMO 2023-24 will be published in May 2023.

## AGL Undertaking for Broken Hill Solar Plant

On 31 October 2022 the AER announced it had accepted a **court Enforceable Undertaking from AGL** in relation to the operation of its Broken Hill Solar Plant.

## The Impact of Capitalisation Differences on Benchmarking – Draft Guidance Note

On 31 October 2022 the AER published a **draft guidance note** on how it will assess the impact of capitalisation differences (how costs are allocated) on its electricity distribution benchmarking. This follows the Consultation paper released in November last year.

## AER Publishes Draft Network Exemptions Guideline

On 31 October 2022 the AER published its **draft Network Exemptions Guideline (version 7) for public consultation**. Submissions are required by 16 December 2022.

## Consumer Protections for Future Energy Services for comment – Paper Released

On 28 October 2022 the AER released an **options paper** as part of the 'Review of consumer protections for future energy services', formerly known as the 'Retailer authorisation and exemption review'. Submissions are required by 16 December 2022.

## AEMO's Retailer Reliability Obligation Requests for South Australia and New South Wales 24 October – Consultation

On 24 October 2022 the AER announced **completion of its review and consultation** of the reliability instrument requests from the Australian Energy Market Operator for South Australia in 2024, and New South Wales in 2025/26.

## New Consumer Vulnerability Strategy

On 20 October 2022 the AER released its **strategy** for reforms to the way the nation's energy system approaches vulnerability among consumers.

## Flexible Export Limits – Issues Paper

On 19 October 2022 the AER published an **Issues Paper** on the introduction of flexible export limits by distribution network service providers across the National Electricity Market.

## AER Commences Process to Determine Recovery of NSW Roadmap Costs

On 5 October 2022 the AER announced commencement of the first contribution determination process for **cost recovery under the NSW Electricity Infrastructure Roadmap**. A Determination is required by 28 February 2023.

## The Wholesale Energy Market Dispute Resolution Adviser (WEMDRA) – Panel Announced

On 5 October 2022 the AER announced that the **WEMDRA** has established a dispute resolution panel to decide on compensation claims.

## Institute for Energy Economics and Financial Analysis Report on Regulated Network Electricity Prices 4 October – AER Statement

On 4 October 2022 the AER issued a **statement about its regulatory framework**.

## Transgrid Electricity Transmission Determination 2023–28 30 September – Draft Decision

On 30 September 2022 the AER published its **Draft Decision** on a revenue proposal received from NSW and ACT electricity transmission network business, Transgrid. Feedback on the Draft Decision is required by 20 January 2023.

## ElectraNet Electricity Transmission Determination 2023–28 30 September – Draft Decision

On 30 September 2022 the AER published its **Draft Decision** on South Australian network ElectraNet's electricity transmission determination. Feedback on the Draft Decision is required by 20 January 2023.

## Murraylink Electricity Transmission Determination 2023–28 – Draft Decision

On 30 September 2022 the AER published its **Draft Decision** on the electricity transmission determination for the Murraylink interconnector for the period 1 July 2023 to 30 June 2028. The Murraylink interconnector delivers electricity between the South Australian and Victorian regions of the National Electricity Market. Feedback on the Draft Decision is required by 20 January 2023.

## Price Variations in Gas Markets – Report

On 30 September 2022 the AER published a **report** into the events of May – August 2022, when there were significant price variations in the Victorian Declared Wholesale Gas Markets, and Adelaide, Sydney and Brisbane Short Term Trading Markets.

## National Competition Council (NCC)

No reportable matters listed.

## Australian Capital Territory Independent Competition and Regulatory Commission (ICRC)

### Regulated Water and Sewerage Services Prices for 2023-28 – Draft Report

On 24 October 2022 the ICRC published its **Draft Report into prices for water and sewerage services** to take effect from 1 July 2023. Submissions are required by 14 December 2022.

## New South Wales

## Independent Pricing and Regulatory Tribunal (IPART)

### Broken Hill Water Prices – Final Report

Not sure about this one?  
<https://www.ipart.nsw.gov.au/Home/Industries/Water/Reviews/Metro-Pricing/Prices-for-Essential-Energy%E2%80%99s-water-and-sewerage-services-in-Broken-Hill-from-1-July-2022>

### Access to New South Wales Rail Network – Draft Report

On 18 October 2022 the IPART released its **Draft Report into the regulatory framework for train operators** to access the New South Wales rail network. Submissions are required by 16 December 2022 and a final report is anticipated in May 2023.

## Northern Territory Utilities Commission

No reportable matters listed.

## Queensland

## Queensland Competition Authority (QCA)

### Solar Feed-in Tariffs in South-east Queensland in 2021-22

On 27 October 2022 the QCA released a report about the solar feed-in tariffs available in south-east Queensland from 1 July 2021 to 30 June 2022.

## South Australia

## Essential Services Commission of South Australia (ESCOSA)

No reportable matters listed.

## Tasmania

## Office of the Tasmanian Economic Regulator (OTTER)

### Proposed Changes to Incident Reporting Guidelines for Tasmanian Electricity Supply Industry – Submission Received

On 7 October 2022 the OTTER published a **submission** received in response to its September 2022 Consultation Paper for proposed changes reporting requirements for Tasmania's electricity distribution network.

### Typical Electricity Customers in Tasmania 2022 – Report Released

On 19 September 2022 the OTTER released a **report** into the differing tariff combinations and usage of its customers.

## Victoria

### Essential Services Commission (ESC)

#### Unaccounted for Gas Benchmarks Review 2022 – Draft Decision

On 31 October 2022 the **ESC published its Draft Decision** on the current unaccounted for gas (UAFG) benchmarks, set to expire at the end of 2022. Feedback is required by 25 November 2022.

#### Water Price Review 2023

On 6 October 2022 the ESC announced receipt of 14 submissions for its **review into proposed water pricing** which will apply from July 2023.

#### Victorian Energy Market Report – September 2022

On 29 September 2022 the **ESC released its report** on the Victorian retail energy market to September 2022.

## Western Australia

### Economic Regulation Authority (ERA)

#### Benchmark Reserve Capacity Price – Draft Determination

On 6 October 2022 the **ERA released its Draft Determination** on its 2023 Benchmark Reserve Capacity Price for electricity, to apply to the 2025-26 capacity year. Submissions are due by 16 November 2022.

#### Western Power's Fifth Access Arrangement Review – Draft Decision

On 27 September 2022 the ERA published its **Draft Decision on proposed revisions to the access arrangement for the Western Power Network 2022/23 –2026/27**. Submissions are required by 16 December 2022, with a Final Decision anticipated in March 2023.

#### 2022 Weighted Average Cost of Capital (WACC) for Freight and Urban Railway Networks – Determination

On 3 August 2022 the ERA published its **2022 rail WACC values**, to apply from 1 July 2022 to 30 June 2023.

## New Zealand

### New Zealand Commerce Commission (NZCC)

#### Performance of New Zealand Retail Fuel Markets – Report Released

On 17 November 2022 the NZCC issued its inaugural **Quarterly Fuel Monitoring Report** for three months ending 30 June 2022, into the performance of New Zealand's retail fuel market.

#### NZCC's Warning to Aurora Energy Limited

On 3 November 2022 the **NZCC announced it has issued a warning** to power lines company Aurora Energy Limited for an excessive level of outages in 2020.

#### NZCC's *Measuring Broadband New Zealand* – Report Released

On 27 October 2022 the NZCC released its latest **Measuring Broadband New Zealand report**, covering the period 15 June to 14 July 2022.

#### Telecommunications Development Levy – Draft Decision

On 26 October 2022 the **NZCC released its Draft Decision** on the allocation of payments for the New Zealand Government's Telecommunications Development Levy for 2021/2022. Submissions were required by 9 November 2022.

#### NZCC Proposed Telecommunications Improvements – Consultation Paper

On 12 October 2022 the **NZCC published a consultation paper** concerning comparison of telecommunications products and providers. Feedback is required by 7 December 2022.

*Network* is a publication of the Australian Competition and Consumer Commission for the Utility Regulators Forum, edited by Darryl Biggar and Yuelan Chen. For mailing list enquiries please contact Genevieve Pound (Genevieve.Pound@acc.gov.au).