



**FEDERAL COURT  
OF AUSTRALIA**



# **Comparative Regulatory Regimes: Australian and International Perspectives**

Justice John Mansfield  
ACCC/AER Regulatory Conference 2016  
4-5 August 2016  
Sofitel Hotel, Brisbane

# Present Australian Regulatory Schemes

- A. Competitive Environment
- B. Monopoly Environment



# Competitive Environment

(1) Legislative regulation

(2) Enforcement ACCC

- (i) prosecution for criminal behaviour) Determined by Courts
- (ii) action for civil penalties )
- (iii) undertakings and other enforcement
- (iv) balancing of public interest – clearance and authorisation
- (v) merger clearance – formal and informal



# Monopoly Environment

- Essential facilities and access
  - Part IIIA
    - Minister / NCC / ACCC
- Energy (electricity and gas)
  - National Energy Market
  - AEMO
  - AER
- Telecommunications
- Consideration of AER processes and regulatory prescriptions.



# Court Judicial Review

Judicial processes in:

- duty of experts
- concurrent evidence of experts
- limitation on extent of evidence
- limitation on extent of submissions

Consideration of value of importing some of those elements into regulatory review processes.



# Australian Competition Tribunal

- Review of Regulatory Decisions
  - (1) ACCC other clearance and authorisation
  - (2) AER regulatory review decisions
  - (3) Minister's Part IIIA access decisionsSubject to Federal Court review
- Merger Authorisation Decisions



# ACT Review “on the merits”

- Full Factual Review
- Limited Merits Review
  - (i) topics
  - (ii) issues
  - (iii) materials
- Merger Review: full hearing

Consideration of respective merits of limited/open review, and of composition of ACT



# Assessment of public interest?

- When appropriate?
- Whose function?
- Whose responsibility?
- What criteria?

“a materially preferable decision in the long term interests of consumers”





# Concluding Remarks

- Significance of importing “policy” elements into regulatory decision making
- Significance of empowering “consumer” representation: will they be the contradictor?
- Larger issues / Regulator’s Role

And the Regulators – the instruments of  
Regulation – struggle on

