Evolution of infrastructure regulation in Australia

Harriet Gray

Working paper No. 1/ July 2009

ACCC/AER WORKING PAPER SERIES
SERIES NOTE

The Australian Competition and Consumer Commission encourages vigorous competition in the marketplace and enforces consumer protection and fair trading laws, in particular the Trade Practices Act.

The Australian Energy Regulator is an independent statutory authority and a constituent part of the ACCC.

Working papers are intended to disseminate the results of current research by ACCC staff and consultants. The aim of the series is to facilitate discussion and comment. The working papers come from across the ACCC covering competition law, economic regulation, and consumer protection. They are available at no cost in electronic format only from the ACCC website, www.accc.gov.au. To subscribe to this series, email working.papers@accc.gov.au

The papers in this series reflect the views of the individual authors. The views expressed in the paper do not necessarily reflect the views of the ACCC or the AER.

Inquiries may be addressed to:

The editor
ACCC/AER working paper series
Australian Competition and Consumer Commission
GPO Box 520
Melbourne Vic 3001
email: workingpapers@accc.gov.au
About the author

Harriet Gray currently holds the position of Counsel with the ACCC/AER.

She joined the ACCC in 1997 and has worked on matters across the energy, communications, water and transport industries. In addition to providing specific legal expertise, Harriet has been closely involved with providing advice on the development of the regulatory regimes.

Harriet has a Bachelor of Laws (First Class Honours) and a Bachelor of Commerce from the University of Adelaide, a Master of Laws from the Australian National University and a Master of Public Policy and Management from the University of Melbourne. She also completed a Federal Court Judge’s Associateship in 2001.
Acknowledgment

I would like to thank and acknowledge:

- ACCC library staff for their assistance in locating the primary sources referred to in this paper.
- ACCC/AER staff in all branches of the Regulatory Affairs Division for checking drafts.
- ACCC/AER staff who attended the seminars that I have given on this topic for their interest and valuable comments.
- Those people who have read the working paper following publication and have taken the time to provide corrections and comments.
Chairman’s introduction

Harriet Gray’s study commences with the first session of the Australasian Federal Convention held in Adelaide between 22 March and 23 April 1897. Federation was the ideal and a lofty goal but the Convention had to direct itself to the practical. The issues debated by delegates included the regulation of postal and telegraphic services, railways and rivers. Much has happened in the intervening 112 years but the debate continues. Issues surrounding the supply and regulation of infrastructure continue to confront Federal, State and Territory governments, infrastructure owners, users and, ultimately, all Australians.

This is the first working paper released by the Australian Competition and Consumer Commission. The working paper series has been established to allow staff (or commissioned consultants) working on research projects to make a contribution to the public policy debate in the areas of competition law, economic regulation and consumer protection. The views expressed are those of the authors and not necessarily those of the ACCC. Nevertheless, the ACCC considers that these working papers are part of its very important brief to disseminate information that educates, informs and influences.

Graeme Samuel
Chairman
Australian Competition and Consumer Commission
## Contents

Foreword ....................................................................................................................... viii

1. Introduction ............................................................................................................ 1  
   1.1 Terminology ................................................................................................. 1  
   1.2 Current regimes: cross-sector overview ....................................................... 3  
   1.3 Historical development: cross-sector overview ......................................... 7  

2. Economy-wide regime .......................................................................................... 20  
   2.1 Background ................................................................................................. 20  
   2.2 Current regulation ....................................................................................... 24  

3. Telecommunications ............................................................................................. 29  
   3.1 Background ................................................................................................. 29  
   3.2 Current regulation ....................................................................................... 34  

4. Postal services ...................................................................................................... 38  
   4.1 Background ................................................................................................. 38  
   4.2 Current regulation ....................................................................................... 40  

5. Airports ................................................................................................................. 41  
   5.1 Background ................................................................................................. 41  
   5.2 Current regulation ....................................................................................... 46  

6. Electricity and gas ................................................................................................ 48  
   6.1 Background ................................................................................................. 48  
   6.2 Current regulation ....................................................................................... 55  

7. Rail ....................................................................................................................... 58  
   7.1 Background ................................................................................................. 58  
   7.2 Current regulation ....................................................................................... 60  

8. Ports and shipping ............................................................................................... 62  
   8.1 Background ................................................................................................. 62  
   8.2 Current regulation ....................................................................................... 70  

9. Water .................................................................................................................... 73  
   9.1 Background ................................................................................................. 73  
   9.2 Current regulation ....................................................................................... 76  

10. Petrol .................................................................................................................... 79  
    10.1 Background ............................................................................................... 79  
    10.2 Current regulation .................................................................................... 85  

11. Conclusion ............................................................................................................ 88  

Glossary ....................................................................................................................... 89  

Reference list ................................................................................................................. 93  

Updates and amendments ............................................................................................ 104
Foreword

The history of the regulation of infrastructure services might at first blush appear to be
an obscure area, of interest to only a handful of specialists. However, with further
reflection this cannot be the case. At one level the number of people actively involved
in economic regulation—as policy makers, consultants, lawyers, regulated firms and
regulatory staff—makes up a small community. At another level, all of the Australian
community is in some way affected by regulatory outcomes.

Further, the history of infrastructure regulation calls into play some of the great
themes of Australian society.

- **Distance and geography**—Geoffrey Blainey’s *Tyranny of Distance* has
  been highly influential in causing people to think about how Australia’s
  geography, and specifically its distance from Europe shaped the evolving
  Australian economy (and society).

  The critical issues of population density, of a small population scattered
  over huge distances and later a highly concentrated urban population
  (by international standards) with widely dispersed and sparsely settled rural
  perimeters has impacted on infrastructure provision and on the nature of
  various regulatory regimes.

- **Colonial beginnings and the role of government**—the role of the British
  Government in establishing a convict settlement and a colony has, some
  historians argue, had a pervasive impact on Australians’ attitudes to
  government and expectations about the role government should play,
  including in the provision and oversight of infrastructure.

  Even though a private sector emerged relatively quickly, it has been argued
  that government spending underpinned the economic success of Australia
  in the second half of the nineteenth century. Noel Butlin emphasised the
  importance of the public sector contribution—the term ‘colonial socialism’
  has been used to describe the role played by government in underpinning
  economic growth at that time.

- **Federalism and national markets**—the nation of Australia grew from
  separate colonies and separate markets, and while political federation was
  achieved in 1901, the development of national markets has been episodic
  and often hard fought.

  Infrastructure stopped at State boundaries. Australia’s ‘multicultural’
  approach to railway development—with New South Wales using the
  European standard gauge and Victoria and South Australia adopting the
  broad Irish gauge—has left an indelible mark and has undoubtedly
  underscored the complexity of rail regulation (not just economic
  regulation) to this day.
• **Cultural and intellectual emergence**—although there is debate about the period of transition and which artist led the transition, historians such as Geoffrey Serle have noted the transition in Australian painting from the time when landscapes were depicted from a European perspective with a European sense of colour and climate to another age that embraced and explored that which was distinctively Australian.

Comparable transitions have occurred in other areas of the arts and can also be seen in the emerging intellectual life of the colonies. The social sciences, including economics, have been heavily influenced by seismic shifts in international thinking, while at the same time developing their own responses to particular Australian conditions.

The history of regulation reflects these influences by embracing major international changes in economic thinking and over time adapting them to the Australian circumstance. What we now refer to as the Hilmer review in the early 1990s was very much prompted by a concern about Australia’s declining productivity and capacity to compete in an international environment. The renewed emphasis in the discipline of economics on efficiency and competition was another influence. The blueprints for regulation that emerged from this work—after an extensive review of international experience and approaches—has arguably placed Australia among the leaders in the economic regulation of infrastructure.

Anne Plympton
General Manager
Regulatory Development Branch
Australian Competition and Consumer Commission
1. Introduction

In 1897 Australian colonies debated the ‘vexed’ question of how to regulate utilities so as to serve ‘the interests of the people’.¹ Over a century later, Australian governments continue to face the same question, with the establishment of Infrastructure Australia to ‘develop a strategic blueprint for Australia’s infrastructure needs’.²

This paper outlines the history and current form (as at 20 March 2009) of economic regulation for the following sectors:

- economy-wide—section 2
- telecommunications—section 3
- post—section 4
- airports—section 5
- electricity and gas—section 6
- rail—section 7
- ports and shipping—section 8
- water—section 9
- petrol—section 10.

This introductory section defines the concept of economic regulation of infrastructure, and provides a cross-sector overview.

1.1 Terminology

Regulation can be broadly defined as government action that is intended to influence the way people behave.³ It encompasses a variety of instruments including:

- primary and subordinate legislation
- administrative decisions and instruments pursuant to legislation

---

¹ Australasian Federal Convention, First Session, Adelaide, 22 March–23 April 1897. See the transcript of the hearings on 17 April 1987 when the delegates debated whether postal and telegraphic matters and control of railways and rivers should be transferred to the federal authority.

² Prime Minister (The Hon. Kevin Rudd MP) and the Minister for Infrastructure, Transport, Regional Development and Local Government (the Hon. Anthony Albanese MP), Rudd Government to Dramatically Overhaul National Infrastructure Policy (Joint media release, 21 January 2008).

• direct government expenditure including grants and subsidies
• taxation including the imposition of taxes and the use of tax incentives
• public ownership
• information campaigns, negotiation and moral persuasion.

**Economic regulation** arises where the government intervenes in market decisions, such as price, rate of return, output, market entry or exit, and competition.\(^4\)

**Infrastructure** describes the structural elements of the economy that provide basic services to industry and households. Such facilities can be categorised as either economic or social\(^5\):

• **Economic infrastructure** usually forms part of a network, and is an input to production processes. Roads, ports, airports, electricity generation and supply, water supply, sewerage, gas and oil pipelines and telecommunications networks commonly fall within this category. The entity that maintains the infrastructure (and/or provides a service using the infrastructure) is sometimes referred to as a **utility**.\(^6\)

• **Social infrastructure** (such as schools, hospitals, prisons and public housing) is directed at providing community services.

The size of the infrastructure service sector means that it is important to the Australian economy in its own right.\(^7\) However, economic infrastructure services are also important as essential household services and business inputs.\(^8\)

The infrastructure sectors covered in this paper are subject to economic regulation by the Australian Competition and Consumer Commission (ACCC) or the Australian Energy Regulator (AER). Petrol does not fit neatly within the definition of economic infrastructure, but is included as this sector is also subject to economic regulation by the ACCC.

---

\(^5\) Smith (1992, p. 3). For a current example of the use of this terminology, see Productivity Commission (2008). As at 1995, about 70 per cent of infrastructure in Australia was classified as economic and the remaining 30 per cent as social: Private Infrastructure Task Force (1995, p. 27).
\(^6\) The public utility concept is discussed in Robinson (1928).
\(^8\) As at 1993–94, direct and indirect infrastructure services inputs for certain sectors (including agriculture, mining and manufacturing) comprised between 7 and 16 per cent of the costs of producing final output. The efficiency of such services therefore has a significant impact on the competitiveness of Australian firms. See Bureau of Industry Economics (1995, pp. xiii and 6–7).
1.2 Current regimes: cross-sector overview

The economy-wide regime to promote the efficient provision of infrastructure was implemented by the Commonwealth of Australia in 1995. In summary, the legislative framework consists of the following components:

- An access regime to facilitate access to natural monopoly bottlenecks in order for businesses to compete in upstream or downstream markets. If a service is declared under the regime and an access seeker and the access provider are unable to agree on the terms and conditions of access, either party may notify the ACCC of the dispute. The ACCC may make an arbitration determination that binds the parties (Part IIIA of the Trade Practices Act 1974 (Cwlth) (the Act, TPA)).

- A prices surveillance regime under which the ACCC may review, but not set, the prices of certain goods and services (Part VIIA of the Act).

- Prohibitions against certain anti-competitive practices that are enforced by a court upon application by the ACCC or a private party (Part IV of the Act).

The legislative framework forms part of a broader National Reform Agenda. Under the Competition Principles Agreement (11 April 1995, as amended to 13 April 2007), the Commonwealth and all State and Territory governments have:

- Agreed to the ‘guiding principle’ that legislation should not restrict competition unless it can be demonstrated that the benefits of the restriction to the community as a whole outweigh the costs, and the objectives of the legislation can only be achieved by restricting competition. Parties are required to review all legislation against this principle.

- Agreed to undertake certain reviews before introducing competition to a market supplied by a public monopoly, including a review on the merits of separating any natural monopoly element from potentially competitive elements (ring fencing).

- Established regulators that are independent of regulated businesses.

- Agreed that government businesses should not have a net competitive advantage simply as a result of public sector ownership (competitive neutrality).

---

9 Unless otherwise indicated, all legislation is Commonwealth-created.
10 See Council of Australian Governments, Communiqué, Canberra, 10 February 2006.
11 The parties to the agreement are the Commonwealth of Australia, State of New South Wales, State of Victoria, State of Queensland, State of Western Australia, State of South Australia, State of Tasmania, Australian Capital Territory and Northern Territory of Australia.
12 The Competition Principles Agreement requires governments to consider establishing a ‘source of price oversight advice’ that is independent from the government business enterprise (GBE): clause 2. However, see also clause 4 (structural reform of public monopolies).
The industry-specific reforms over the last 15 years are based on this model. Table 1 provides an overview of the current regimes for the sectors covered by this paper (excluding petrol). In summary:

- The Commonwealth has principal responsibility for telecommunications, post and airports. The States and Territories have principal responsibility for the other sectors (electricity, gas, rail, ports and water), although a uniform regime has been established for electricity and gas.

- The extent to which infrastructure services are provided by vertically separated private enterprises that are subject to open competition varies across the sectors. The sectors most similar to this model are airports, gas, electricity and telecommunications (although the form of ring fencing and the extent of privatisation differs). The sector least similar to this model is post (a vertically integrated Commonwealth enterprise with a statutory monopoly). There is no uniform approach across the States and Territories for rail, ports and water.

- All sectors are subject to the competition law provisions in Part IV of the TPA (although telecommunications is subject to the additional regime in Part XIB of the TPA and liner cargo ships that sail between Australia and other countries are partially exempt under Part X of the TPA).

- All sectors are subject to an open access regime. However, only the airport regime relies principally upon the ‘declare-negotiate-arbitrate’ model in Part IIIA of the TPA. The other regimes are based on this model but include more interventionist features. In particular:
  → electricity and gas networks are subject to an upfront determination of maximum revenue or price.
  → telecommunications networks are subject to regulatory signalling (where the ACCC issues pricing principles and model terms and conditions).
  → postal services are subject to Commonwealth ministerial direction.
  → rail, port and water services are subject to multiple access regimes.

- All sectors are subject to some form of surveillance of prices and/or information-gathering and monitoring (although the regimes differ significantly).
Table 1  Current economic regulation of infrastructure: Cross-sector overview

<table>
<thead>
<tr>
<th>Jurisdiction</th>
<th>Infrastructure sector(s)</th>
<th>Privatised</th>
<th>Open competition</th>
<th>Market characteristics of incumbent(s)</th>
<th>Vertical separation</th>
<th>Access regime</th>
<th>Prices surveillance and/or information-gathering</th>
<th>Competition law</th>
<th>Economic regulator</th>
</tr>
</thead>
<tbody>
<tr>
<td>Telecommunications</td>
<td>Commonwealth</td>
<td>Yes(^{13})</td>
<td>Yes</td>
<td>Vertically integrated but subject to operational separation</td>
<td>TPA, Part XIC <em>Telecommunications Act 1997 (Cwlth)</em> Schedule 1</td>
<td>TPA, Part XIB</td>
<td>TPA, Parts IV and XIB</td>
<td>ACCC</td>
<td></td>
</tr>
<tr>
<td>Post</td>
<td>Commonwealth</td>
<td>Government-owned</td>
<td>Statutory monopoly over certain services</td>
<td>Vertically integrated but subject to monitoring for cross subsidies between regulated and unregulated services</td>
<td><em>Australian Postal Corporation Act 1989 (Cwlth)</em></td>
<td>TPA, Part VIIA; <em>Australian Postal Corporation Act 1989 (Cwlth)</em></td>
<td>TPA, Part IV</td>
<td>ACCC</td>
<td></td>
</tr>
<tr>
<td>Airports</td>
<td>Commonwealth</td>
<td>Operated by private sector under long-term government lease</td>
<td>Yes</td>
<td>Structural separation</td>
<td>TPA, Part IIIA <em>Threat of regulation</em></td>
<td>TPA, Part VIIA; <em>Airports Act 1996 (Cwlth)</em></td>
<td>TPA, Part IV</td>
<td>ACCC</td>
<td></td>
</tr>
<tr>
<td>Electricity networks</td>
<td>Uniform regime</td>
<td>Varies between States</td>
<td>Yes</td>
<td>Legal and operational separation</td>
<td><em>National Electricity Law and National Electricity Rules</em></td>
<td><em>National Electricity Law and National Electricity Rules</em></td>
<td>TPA, Part IV</td>
<td>AER</td>
<td></td>
</tr>
<tr>
<td>Gas pipelines</td>
<td>Uniform regime</td>
<td>Yes</td>
<td>Yes</td>
<td>Legal and operational separation</td>
<td><em>National Gas and National Gas Rules</em></td>
<td><em>National Gas and National Gas Rules</em></td>
<td>TPA, Part IV</td>
<td>AER</td>
<td></td>
</tr>
<tr>
<td>Railway tracks</td>
<td>Commonwealth and States</td>
<td>ARTC—Commonwealth-owned Other track providers—varies between States</td>
<td>Yes</td>
<td>ARTC—structural separation Other track providers—varies between States</td>
<td>TPA, Part IIIA State regimes</td>
<td>State regimes</td>
<td>TPA, Part IV</td>
<td>ACCC and State regulators</td>
<td></td>
</tr>
</tbody>
</table>

\(^{13}\) As at 22 March 2009, the Australian Government’s Future Fund owned 17 per cent of Telstra.
<table>
<thead>
<tr>
<th>Jurisdiction</th>
<th>Infrastructure incumbent(s)</th>
<th>Market characteristics of sector:</th>
<th>Access regime</th>
<th>Prices surveillance and/or information-gathering</th>
<th>Competition law</th>
<th>Economic regulator</th>
</tr>
</thead>
<tbody>
<tr>
<td>Ports</td>
<td>States</td>
<td>Varies between States</td>
<td>Varies between States</td>
<td>TPA, Part IIIA State regimes</td>
<td>State regimes</td>
<td>TPA, Part IV ACCC and State regulators</td>
</tr>
<tr>
<td>Water and sewerage networks</td>
<td>Commonwealth and States</td>
<td>Varies between States</td>
<td>Varies between States</td>
<td>TPA, Part IIIA; State regimes; Murray–Darling Basin: <em>Water Act 2007</em> (Cwlth)</td>
<td>State regimes</td>
<td>TPA, Part IV ACCC and State regulators</td>
</tr>
</tbody>
</table>

14 Container stevedoring services are subject to prices surveillance under Part VIIA of the TPA.
1.3 Historical development: cross-sector overview

The current regulatory regimes have evolved as a result of the policy objectives of successive governments. Although patterns are often difficult to discern, in general Australia has followed the international trend away from monopoly provision of infrastructure services by a single publicly owned operator towards open competition, privatisation and incentive regulation\(^\text{15}\) of the ‘bottleneck’ facility.\(^\text{16}\)

**Late 1800s to Federation (1901)**

Australian colonies, along with New Zealand, pioneered the use of public enterprises for developmental purposes. From 1861 to 1900 government capital outlays in Australia accounted for one-third to one-half of total capital outlays—a far higher proportion than in most other capitalist countries.\(^\text{17}\) This was principally in response to the economic conditions, including the distances to be covered and the absence of large local capitalists.\(^\text{18}\) However, Australia also had a history of public enterprise. The occupation of Australia in 1788 was funded by the British Government. As Bland put it\(^\text{19}\):

> The first two or three decades after 1788 saw State activity in excelsis. The Government fed, clothed and employed everyone. It cleared and cultivated farms; it bred and reared flocks; it built and ran mills; it discovered and developed mines.

The transition from British to colonial public funding began in the 1820s.\(^\text{20}\) By 1890 the move to Federation had begun, with the holding of the first Federation Conference.\(^\text{21}\) The debate during the subsequent decade over the proposed federation of the colonies raised issues that influence the regulation of infrastructure today. In respect of whether telegraphic and postal matters should be controlled by the Commonwealth or the States, one delegate argued\(^\text{22}\):

> It seems to me that postal and telegraphic matters are matters of purely local concern, and that to transfer them to the federal authority would be a great mistake. The effect would be to bring about centralisation in its worst form, and cause great detriment to outlying districts.

\(^{15}\) Incentive regulation (e.g. price caps) seeks the attainment of regulatory goals in the most efficient manner possible by decisions being made under the constraints of the marketplace: see Meier (1985, pp. 288–89); and Sappington and Weisman (1996, p. 3).

\(^{16}\) See Gray (1996); and Lewington (1997).

\(^{17}\) Butlin (1964, p. 6).


\(^{19}\) Bland (1945, p. 203).

\(^{20}\) Butlin (1994, p. 93).


\(^{22}\) Mr Holder, Australasian Federal Convention, First Session, Adelaide, 22 March to 23 April 1897 (transcript, 17 April 1897).
Another delegate stated\textsuperscript{23}:  

There is one matter which … is of great importance in the minds of the people who will have the final say concerning this Constitution. They want to know what it is going to cost them. … [T]he Federal Parliament will have to return to each state all the money raised from … the Post-office ….

The Australian use of public enterprises can be contrasted to the United Kingdom (UK) and United States (US) where there was increased control of privately owned monopolies by government rules. Examples include:

- The 1844 UK Railways Act, which, among other things:
  \begin{itemize}
  \item provided for tolls to be regulated where, after 21 years, profits exceeded the rate of ten pounds for every hundred pounds of capital stock
  \item allowed the state to acquire railways in certain cases
  \item set minimum standards for trains carrying third class passengers.\textsuperscript{24}
  \end{itemize}

- The founding of the US Interstate Commerce Commission in 1887 to regulate railways.\textsuperscript{25}

- The 1890 US Sherman Act (the foundational antitrust law).\textsuperscript{26}

\textbf{1901–60s}

In the early twentieth century, Australian Labor Party politicians saw government enterprise and nationalisation as a way to combat private monopoly and achieve social justice.\textsuperscript{27} In 1901 the Commonwealth Postmaster-General’s Department was established with a monopoly over domestic telecommunications services and carriage of all letters weighing up to one pound.\textsuperscript{28} The minister stated\textsuperscript{29}:

I should like to mention one fact in connexion with the telegraph monopoly, and that is that it allows us to look ahead; take advantage of every invention and adapt it to the benefit of the public. If the telegraph service had been in the hands of a private proprietary, I am inclined to think that it would have fought very much against the introduction of the telephone service …

\begin{flushleft}
\textsuperscript{24} An Act to attach certain Conditions to the Construction of future Railways authorized or to be authorized by any Act of the present or succeeding Sessions of Parliament; and for other Purposes in relation to Railways 1844 (UK). See www.railwaysarchive.co.uk/documents/HMG_Act_Reg1844.pdf (accessed 20 March 2009).
\textsuperscript{25} Viscusi et al. (2005, p. 363).
\textsuperscript{27} Cranston (1987, p. 123). The Commonwealth Postmaster-General’s Department was established by a Protectionist Party government (1901–04). The other examples of Commonwealth business enterprises in this section (1901–60s) were established by Australian Labor Party governments.
\textsuperscript{28} Post and Telegraph Act 1901.
\textsuperscript{29} Second reading speech on the Post and Telegraph Bill 1901: Australia, Debates, Senate, 6 June 1901, p. 763 (Senator Drake, Postmaster-General).
\end{flushleft}
Other examples at the Commonwealth level include the:

- Railway Construction Department, authorised in 1911 to construct a railway connecting Western Australia to South Australia.

- Department of Defence Civil Aviation Branch, established in 1920 to operate airports.


- Overseas Telecommunications Commission, established in 1946.

- Snowy Mountains Hydro-electric Scheme launched in 1949.

As Ricketts notes, the focus of economic thinking at the time—the belief that a competitive market will maximise social welfare as each firm tries to make as much profit as possible and each consumer maximises their own utility—is capable of leading public policy in two different directions. One response is to argue that policy should concentrate on removing impediments to competition. Another is to emphasise the improbability of the conditions for perfect competition, and the role of government in acting in the public interest by correcting for failures in the market.

Until the 1960s, a common perception was that markets often fail and that such failures require public ownership and provision of services. Government provision of infrastructure was justified on the basis that the market would fail to meet social goals and that the infrastructure was a natural monopoly (where one facility can supply a market at a significantly lower cost than two or more facilities)—a private monopolist, as the sole producer of the product or service, would be able to use its market power to set prices that exceed costs, to the detriment of economic efficiency and social welfare.

At another level, the 1914–18 and 1939–45 world wars reshaped the role of executive government. In Australia, a Commonwealth Prices Commissioner was appointed (with

---

30 Kalgoorlie to Port Augusta Railway Act 1911.
32 Australian National Airlines Act 1945.
33 Overseas Telecommunications Act 1946.
34 Snowy Mountains Hydro-electric Power Act 1949.
35 See, for example, the development of the properties of a general competitive equilibrium by Walras (1874), Pareto (1892) and Pigou (1912).
37 See King and Maddock (1996, pp. 4–11).
38 Market power can be defined as the ability of a firm to raise prices above the supply cost (the minimum cost an efficient firm would incur in producing the product) without rivals taking away customers in due time: Queensland Wire Industries Pty Ltd v Broken Hill Pty Co Ltd (1989) 167 CLR 177, 189 per Mason CJ and Wilson J.
39 The social costs of monopoly power are discussed in Gans, King and Mankiw (2009, pp. 327–30).
a deputy commissioner in each State and Territory) to control prices, including petroleum product prices, from 1939. The adoption of Keynesian thinking further consolidated this trend towards a more activist approach by governments to economic management.

Until the 1960s Australia followed a similar trend to the UK. Inland telephone services were nationalised under the UK General Post Office in 1911. The Central Electricity Board was established under the Electricity (Supply) Act (1926) to coordinate and build a national transmission grid. In 1926 a privately owned company became British Broadcasting Corporation (BBC), a public corporation operating under a Royal charter. The British Overseas Airways Corporation (later to become British Airways) was established in 1939. In 1948 railways were transferred to the British Transport Commission.

This can be contrasted to the US. Although railroads were nationalised as an interim measure under the Railroad Administration during World War I, the dominant trend was towards the creation of agencies to regulate private industry—for example, the Federal Trade Commission (1914), the Water Power Commission (1920), the Federal Radio Commission (1927) (later the Federal Communications Commission) and the Civil Aeronautics Authority (1933).

During this time, the US developed ‘rate of return’ regulation as a methodology for setting prices charged by regulated private monopolies. Under this approach, the regulatory agency fixes the rate of return that a utility can earn on its assets. The prices that the utility can charge are set so as to allow the utility to earn the specified rate of return and no more. Regulated prices can be adjusted upwards if the utility starts

---

40 National Security Act 1939. The scope of this new function was illustrated by the Adviser to the Commonwealth Prices Commissioner (Sir Marcus Clark):

[H]ow satisfied would you feel, with a staff of just over a hundred men spread over the whole continent of Australia to ascertain prevailing prices at 31 August 1939, and prevailing rates of gross profit at that date.

See Copland and Sir Marcus Clark (1941, p. 34).

41 Contrary to the earlier view that the market ultimately settles at a state of full employment, Keynes advocated an interventionist government policy by which the government would use fiscal (budget expenditure) and monetary (interest rate) measures to mitigate the adverse effects of economic recessions and booms, and ensure steady economic growth: Keynes (1936).

42 Telephone Transfer Act 1911 (UK).

43 See the list of Royal charters at United Kingdom, Privy Council Office, www.privy-council.org.uk/output/Page44.asp (accessed 20 March 2009). The BBC charter is dated 20 November 1926.


45 Railway Administration Act 1918 (US).


49 Communications Act 1934 (US).

50 Civil Aeronautics Act 1933 (US).
making a lower rate of return, and adjusted downwards if the utility makes a higher rate.\textsuperscript{51}

The development of rate of return regulation was, in part, driven by the US Supreme Court. In \textit{Munn v Illinois}, it was held that the US Constitution did not prevent legislative regulation of a private company if it was a utility operating in the public interest.\textsuperscript{52} In \textit{Hope Natural Gas}, the Supreme Court held that a utility’s revenues should be sufficient to cover operating expenses and the capital cost of the business, with the return to the equity owner commensurate with returns on investment in other businesses with comparable risks.\textsuperscript{53}

\textbf{1970s}

During the 1960s there was increasing recognition that, if markets could fail, so too could government regulation. The command-and-control model of preceding years internalised the natural monopoly problem by replacing the narrow interests of shareholders (profit maximisation) with the wider interests of the state through public ownership. The model was aimed at addressing the principal-agent problem, whereby the interests of the agent (firm) do not coincide with those of the principal (government).\textsuperscript{54}

Increasingly, the command-and-control model was perceived to be generating poor performance—firms suffered from inadequately defined (and often changing) objectives and associated political interference, and weak incentives to improve performance arising from loss of managerial responsibility and accountability.\textsuperscript{55}

Consequently, Australia, like the UK\textsuperscript{56}, started to review the governance of state enterprises. Following the election of the Whitlam Labor Government in 1972, Australia moved towards the use of statutory authorities to provide utility services.\textsuperscript{57} For example, in 1975 the Postmaster-General’s Department was replaced by two separate statutory authorities—the Australian Postal Commission (Australia Post) and the Australian Telecommunications Commission (Telecom).\textsuperscript{58} The minister stated\textsuperscript{59}:

For both services, charged as they are with such important responsibilities on behalf of the people of Australia, a degree of freedom of management is

\begin{itemize}
\item Alexander and Irwin (1997).
\item 94 US 113 (1876).
\item \textit{Federal Power Commission v Hope Natural Gas} 320 US 591 (1944).
\item Blackmon (1994, pp. 7–8).
\item See the discussion in Organisation for Economic Co-operation and Development (1992, pp. 15 and 18–19).
\item See Royal Commission on Australian Government Administration (1976, par. 4.4.10). The establishment of statutory authorities by Australian governments from the 1850s is discussed in Spann (1979).
\item \textit{Postal Services Act 1975} and \textit{Telecommunications Act 1975}.
\item Second reading speech on the Postal Services Bill 1975: Australia, \textit{Debates}, Senate, 23 April 1975, p. 1256 at pp. 1257–58 (Senator Bishop, Postmaster-General).
\end{itemize}
considered most important. It is believed that this can be provided best by
operation as a commission rather than as a department within the Public Service.
This also gives the opportunity for people outside the day to day management to
bring their experience to bear, as commissioners, on the complex problems of the
separate businesses. The Minister responsible for the commissions will however
retain control in a number of key areas.

These reforms occurred in the context of broader economic concerns. Following the
first oil shock in 1973, the global economy entered into a period of ‘stagflation’ (where,
contrary to post-war macroeconomic theory, inflation and economic stagnation occur
simultaneously).\footnote{See Stonecash, Gans, King and Mankiw (2009, pp. 378–79).}
In response, the Australian Government enacted the \textit{Prices Justification Act 1973},
which established a tribunal to review prices, and the \textit{Trade Practices Act 1974},
which established the Trade Practices Commission to enforce the
competition and consumer protection provisions contained in the Act. As in other
countries\footnote{See Fels (1974); and Nieuwenhuysen and Daly (1977, chapter 9).},
these Acts formed part of a prices and incomes policy intended to control
inflation.\footnote{See second reading speech on the Prices Justification Bill 1973: Australia,
\textit{Debates}, House of Representatives, 9 May 1973, p. 1888 (Mr Crean, Treasurer); and second
reading speech on the Trade Practices Bill 1974: Australia, \textit{Debates}, House of Representatives,
16 July 1974, p. 225 at p. 226 (Mr Enderby, Minister for Manufacturing Industry).}

\section*{1980s}

In the early 1980s, following a second round of oil price increases in 1979 and 1980
and an outbreak in wages claims, Australia again faced rising inflation and
unemployment.\footnote{See Economic Planning Advisory Council (1991).}
In 1983 the newly elected Hawke Labor Government enacted the \textit{Prices Surveillance Act 1983},
which established the Prices Surveillance Authority, as
part of the Accord agreement with the Australian Council of Trade Unions to control
prices and wages (the earlier Prices Justification Act had been repealed by a Liberal

The Labor Government also embarked on a government business enterprise reform
program that sought to make GBEs more independent from government, responsive to
consumer needs and efficient.\footnote{Minister for Finance, Senator the Hon. Peter Walsh (1987).}
In 1989 Telecom was ‘corporatised’, an independent
regulator (Australian Telecommunications Authority, AUSTEL) was established, and
limited competition was introduced. The minister stated\footnote{Second reading speech on the Telecommunications Amendment Bill 1988: Australia,
\textit{Debates}, House of Representatives, 28 September 1988, p. 1072 (Mr Willis, Minister for Transport and
Communications).}:

\begin{quote}
The reforms to Government business enterprises are central to the Government’s
micro economic reform agenda for restructure of the public sector. In the present
difficult and fiercely competitive international trading environment public sector
efficiency is especially important. Many public business enterprises—particularly
those in the Transport and Communications portfolio—produce not only final
goods and services for the consumer, but also provide intermediate inputs for the
rest of the economy, and thus influence the nation’s overall cost structures.
\end{quote}
In future the Government will be less involved in scrutinising the day to day activities of Telecom. Instead, it will focus on planning, through corporate plans and financial targets, and accountability for results with strategic aspects monitored on an ongoing basis.

Other examples include:

- the reduction of Australia Post’s monopoly in 1983 and its corporatisation in 1989
- the transfer of airports from the Department of Aviation to the Federal Airports Corporation in 1988
- the announcement in 1987 of the end of the two airline policy in 1990.

The Australian approach during the 1980s can be contrasted to reforms in the UK, although those reforms would later impact upon Australia. The Thatcher Government, elected in 1979, advocated greater independence of the individual from the state and less government intervention. Under the Conservative Party (1979 to 1997), the UK embarked upon the privatisation of nationally owned enterprises including British Telecommunications (1984), British Airports Authority (1987) and National Grid Company (1990).

The UK’s privatisation process was accompanied by the establishment of new regulatory regimes administered by industry-specific regulators. During the 1970s, there had been growing concern over the US model of rate of return regulation by independent industry-specific commissions. The model was criticised for distorting incentives for productive and dynamic efficiency (and the consequential impact on service quality), excessive legalism and capture by private (industry) interests.

In 1982 the UK Secretary of State, in commissioning a study of alternative schemes for regulating British Telecommunications, expressed a desire for regulation with a ‘light

---

66 Australian Postal Corporation Act 1989.
69 The notable exception was the Royal Mail, although a Bill is currently proposed to allow a partial privatisation: Post Services Bill 2008–09; see services.parliament.uk/bills/2008-09/postalservices.html (accessed 12 March 2009).
71 Airports Act 1986 (UK).
72 Electricity Act 1989 (UK) and Central Electricity Generating Board (Dissolution) Order 2001 (UK).
73 See, for example, Averch and Johnson (1962); Posner (1969) and (1974); Kahn (1971); and MacAvoy (1979) (which sought to quantify the cost of second-order economic consequences arising from regulation).
74 See, for example, Stigler (1971); Stigler and Friedland (1962); and Peltzman (1976).
rein\(^75\) (later referred to as ‘light handed’ regulation). The resulting price cap approach (incentive regulation) stressed the attainment of regulatory goals in the most efficient manner possible by allowing regulated firms to make their own pricing decisions subject to the constraints of the marketplace and the price cap.\(^76\)

Under price cap regulation, the regulated price is adjusted each year by the rate of inflation (the Retail Price Index—RPI—in the UK and the Consumer Price Index—CPI—in Australia), plus or minus some predetermined amount (‘X’ representing the expected annual gain in the utility’s efficiency) and without regard to changes in the firm’s profits.\(^77\)

The new UK regulators established during the 1980s included the Office of Telecommunications\(^78\) (now the Office of Communications, Ofcom)\(^79\), Office of Electricity Regulation, OFFER\(^80\) and Office of Gas Supply, Ofgas\(^81\) (now the Office of Gas and Electricity Markets, Ofgem)\(^82\), Rail Regulator\(^83\) (now the Office of Rail Regulation, ORR)\(^84\) and Water Services Regulation Authority, Ofwat.\(^85\)

**1990s**

By the 1990s in Australia, greater exposure to international competition through tariff cuts and the floating of the Australian dollar had created pressure for more efficient delivery of utility services.\(^86\) In 1995 the Commonwealth and States reached a final agreement\(^87\) on a National Competition Policy (NCP), which was intended to ‘facilitate effective competition in the interests of economic efficiency’.\(^88\) This reflected a wider

---


\(^76\) See Meier (1985, pp. 288–89); and Sappington and Weisman (1996, p. 3).

\(^77\) Alexander and Irwin (1997).

\(^78\) Telecommunications Act 1984 (UK).

\(^79\) Office of Communications Act 2002 (UK).

\(^80\) Electricity Act 1989 (UK).

\(^81\) Gas Act 1986 (UK).

\(^82\) Utilities Act 2000 (UK).

\(^83\) Railways Act 1993 (UK).

\(^84\) Railways and Transport Safety Act 2003 (UK).

\(^85\) The Director General of Water Services, which had been the regulator under the Water Industry Act 1991 (UK), was replaced by the Water Services Regulation Authority under the Water Act 2003 (UK).


\(^87\) Competition Principles Agreement (11 April 1995), Conduct Code Agreement (11 April 1995) and Agreement to Implement the National Competition Policy and Related Reforms (11 April 1995).


---

The package gives appropriate consideration, not only to competition and efficiency considerations, but to all the other policy objectives which governments must balance in making policy decisions.
belief in the benefits of open competition and privatisation (or, as Osborne and Gaebler put it, governments should ‘steer, not row’).

In particular, the 1995 reforms:

- extended the scope of the competition law in Part IV of the TPA, and the Prices Surveillance Act (later replaced by Part VIIA of the TPA) to apply to State-owned businesses
- provided for an access regime (Part IIIA of the TPA)
- required the review of legislation that restricts competition
- provided for the reform of GBEs (including consideration of independent prices oversight, competitive neutrality and reviews to be undertaken before privatisation of a public monopoly)
- provided for payments by the Commonwealth to the States.

Within the umbrella of the NCP, industry-specific microeconomic reforms were initiated by the Keating Labor Government (1991–96) and carried through by the Howard Liberal Government (1996–2007). For example:

- In telecommunications, a general telecommunications carrier and three public mobile operator licences were created in 1991 to be replaced by open competition after 30 June 1997. Telecom was converted to a company (Telstra Corporation Ltd), which was later privatised (commencing in 1997). As part of the transition in 1997, the industry-specific regulator (AUSTEL) was replaced by the ACCC, and a telecommunications-specific competition and access regime was inserted into the TPA.

- In airports, the process of privatisation commenced in 1996 through long-term (99-year) leases. This was accompanied by a transitional (five year) price cap regime administered by the ACCC under the Prices Surveillance Act.

- In energy, the States and Territories (as a condition for the NCP payments by the Commonwealth) reached agreement on the creation of a national...
electricity market in the Eastern States underpinned by an open access regime (1996)\(^96\) and a code for the economic regulation of natural gas pipelines (1997).\(^97\) Subject to certain exceptions, regulation was divided between the ACCC (transmission) and State and Territory regulators (distribution).

- In rail, the Commonwealth and States reached agreement on a national track authority (Australian Rail Track Corporation, ARTC) to provide access to the interstate standard gauge rail network.\(^98\)

The 1995 reforms established, in place of the Trade Practices Commission and Prices Surveillance Authority, the ACCC as an economy-wide regulator with responsibility for competition law, consumer protection and economic regulation. This was intended to foster a pro-competition culture, reduce distortions across industries, provide administrative savings, reduce investor uncertainty and regulatory intervention, provide greater accountability and reduce the risk of regulatory capture.\(^99\) The reform, however, was not universally supported.\(^100\)

### 2000: current decade

While Australia enjoyed a sustained period of economic growth following the recession in 1990–91\(^101\), the beginning of the twenty-first century was dominated by issues surrounding private investment and Australia’s federal system.

As in other countries\(^102\), the complexities of large-scale privatisations soon became evident. Although Part IIIA was intended to address the limitations of competition law in resolving access issues\(^103\), it was also expected to be less interventionist than regulated outcomes and was intended to ‘facilitate the evolution of more market-oriented solutions over time’.\(^104\) The model provided for a public interest test to be

---

97 Natural Gas Pipelines Access Agreement (7 November 1997).
98 Australian Rail Track Corporation Agreement (14 November 1997) between the Commonwealth, New South Wales, Victoria, Queensland, Western Australia and South Australia.
100 See, for example, comments by a former Commissioner of the Trade Practices Commission: Pengilley (1998, p. 543).
101 Australian Bureau of Statistics, *Year Book Australia* 2004 (cat. no. 1301.0), ‘National income, expenditure and product accounts’. A recession is defined as two consecutive quarters of negative growth.
102 For example, in the UK, Network Rail took over the railway infrastructure of Railtrack in 2002 following the liquidation of Railtrack. Although not a state owned company, Network Rail has no shareholders (as a company limited by guarantee) and is underwritten by the state. In New Zealand, the government took an 80 per cent stake in the near-bankrupt national air carrier Air New Zealand in 2003 and purchased the railway network and rolling stock of TranzRail/Toll New Zealand (2001, 2004 and 2008). See en.wikipedia.org/wiki/Nationalization (accessed 17 March 2009); and Flynn (2007, chapter 11).
103 See the Federal Court decision in *Queensland Wire Industries Pty Ltd v BHP* (1988) ATPR 40–841, 49,076–49,077; and the discussion on s. 46 in Part IV of the TPA in the Hilmer report, pp. 242–45.
104 Hilmer report, p. 255.
applied on a case-by-case basis for determining whether assets should be regulated (declaration). Even then, regulation might still not be required as the parties were expected to negotiate private deals under the threat of arbitration by the regulator (the ACCC).

However, the incentive for an infrastructure provider to negotiate depends upon the extent to which the provider has market power and competes in a market in which the infrastructure service is a production input (vertical integration). In contrast to the ex ante energy and airport regimes (where the natural monopoly facility was separated from the contestable market elements and revenue or price was set upfront by the regulator), the ex post telecommunications access regime soon became bogged down in access disputes.

The shift towards private provision of infrastructure subject to economic regulation also led to concerns about the potential dampening effects of regulation on investment in infrastructure. For example, the Exports and Infrastructure Taskforce concluded:

The greatest impediment to the development of infrastructure … is the way in which the current economic regulatory framework is structured and administered. It is adversarial, cumbersome, complicated, time consuming, inefficient and subject to gaming by participants. There are too many regulators and regulatory issues are slowing down investment in infrastructure used by export industries.

There is a stark contrast here. Where Australia’s logistics chains are vertically integrated and are subject to much less economic regulation, the response to increased global demand has been timely, effective and efficient. In contrast, in those parts of the economy where economic regulation sits between investors in export related infrastructure and users, lengthy delays have been widespread, as infrastructure owners, users and regulators focus more on shifting slices of the pie than on ensuring that the pie expands to meet competing demands.

The collapse and effective re-nationalisation in Australia of some private enterprises highlighted the complexities associated with privatisation.

The reforms to the regulatory regimes in the current decade have principally been aimed at improving the effectiveness of the regimes, and the promotion of efficient new infrastructure investment. For example:

- In airports, the price cap regime was replaced in 2002 by price monitoring at Sydney, Brisbane, Melbourne, Perth and Adelaide airports, although (in

---

105 Although note that access providers have attributed the failure to reach negotiated outcomes to other factors such as regulatory signaling which removes incentives for access seekers to negotiate: see Gray, Malam and Naughtin (2007).

106 As at 1 January 2008, 115 telecommunications access disputes had been notified since the commencement of the regime in 1997. In contrast, as at 20 March 2009, three access disputes had been notified for airport, gas transmission and sewerage services.

107 Exports and Infrastructure Taskforce (2005, p. 2).

108 For example, the Tasmanian rail network reverted to state ownership in January 2007. Under the Deed, Pacific National continues to operate the rail network and act as the track manager on behalf of the Tasmanian Government. See Department of Infrastructure, Energy and Resources (Tasmania) Rail Management Unit, www.dier.tas.gov.au/major_projects/rail_management_unit.

109 Regional air services at Sydney Airport continue to be declared under Part VIIA of the TPA.
2007) the Australian Government reserved the right to re-impose price controls if airport operators were found to be acting inconsistently with the Government’s Aeronautical Pricing Principles.110

- In energy, the AER became the economic regulator in place of the ACCC and State regulators (although the AER remains administratively part of the ACCC).111 The amended regimes created two categories of services—those subject to ex ante upfront price or revenue control and those subject only to ex post dispute resolution. In the former category of services, the regimes became more prescriptive to reduce the regulator’s discretion.

- In telecommunications, the Commonwealth introduced an operational separation framework for Telstra in advance of the sale of its remaining shareholding.112 Part XIC of the TPA was also amended to facilitate new investment (by allowing exemptions and undertakings to be submitted for services not yet declared)113 and to provide for regulatory signalling (the ACCC determines pricing principles at the time a service is declared, publishes bilateral arbitration determinations and issues model terms and conditions).114

The second theme dominating the current decade has been achieving effective regulation in a federal system. The Exports and Infrastructure Taskforce provided the example of an operator of interstate trains who may potentially have to deal with115:

- seven rail safety regulators with nine different pieces of legislation;
- three transport accident investigators;
- fifteen pieces of legislation covering occupational health and safety of rail operations;
- six access regulators; and
- seventy-five pieces of legislation with powers over environmental management.

Some progress has been made in this area. For example, a key reform of the Howard Liberal Government was the enactment of the *Water Act 2007* to enable the Commonwealth to oversight water management in the Murray–Darling Basin. In 2008 all Australian governments entered into a National Partnership Agreement to Deliver a

110 Treasurer (the Hon. Peter Costello) and the Deputy Prime Minister and Minister for Transport and Regional Services (the Hon. Mark Vaile), *Productivity Commission Report—Review of Price Regulation of Airport Services* (Media release No. 032, 30 April 2007).

111 See the *National Gas (South Australia) Act 2008* (SA) and *National Electricity (South Australia) (New National Electricity Law) Amendment Act 2005* (SA), which amended the *National Electricity (South Australia) Act 1996* (SA).

112 *Telecommunications Legislation Amendment (Competition and Consumer Issues) Act 2005*.

113 *Telecommunications Competition Act 2002*.


115 Exports and Infrastructure Taskforce (2005, p. 49).
Seamless National Economy.\textsuperscript{116} However, a 2006 intergovernmental agreement to implement a simpler and consistent national approach to regulation of significant rail and port infrastructure is yet to be realised.\textsuperscript{117}

\textsuperscript{116} The intergovernmental agreement includes the 27 deregulation priorities agreed by COAG in March 2008, the eight priority areas for competition reform agreed by COAG in July 2008, and regulatory reform that continues to develop and enhance existing processes for regulation making and review to increase the efficiency of regulation.

\textsuperscript{117} Competition and Infrastructure Reform Agreement (10 February 2006), clauses 3.1 and 4.1.
2. Economy-wide regime

The development in Australia of an economy-wide regime to promote the efficient provision of infrastructure services commenced in the early 1990s and now consists of the following parts of the *Trade Practices Act 1974*:

- IIIA (national access regime)
- IV (competition law)
- VIIA (prices surveillance).

This section describes the historical development of the Australian Government’s competition and pricing powers, and the current economy-wide regime.

2.1 Background

2.1.1 Federation to 1980s

Prior to the 1970s, the Australian Government’s attempts to address the problem of restrictive trade practices had met with little success. Following the Sherman Act 1890 (US), the *Australian Industries Preservation Act* was enacted in 1906 but languished after a High Court of Australia decision on its constitutional validity. In 1965 there was a further attempt to introduce rigorous trade practices legislation but the reforms were watered down in the face of substantial business opposition. Apart from during the first and second world wars, there was also no general price control regime.

In the early 1970s the Commonwealth Labor Government introduced:

- The *Prices Justification Act 1973*, which established the Prices Justification Tribunal to act as a watchdog on the price of goods and services supplied by companies. The Act provided for ‘price justification’ as opposed to ‘price control’ as it was not mandatory for companies to comply with the Tribunal’s findings.
- The TPA, which established the Trade Practices Commission, outlawed restrictive trade practices and ensured consumer protection and product and manufacturing liability.

---

120 A history of prices oversight in Australia is set out in Productivity Commission (2001B, chapter 2). See also Hall and Nieuwenhuysen (1987).
As in other countries, the Prices Justification Act was part of a prices and incomes policy to control inflation.\(^{121}\) The TPA was intended to:\(^{122}\)

promote efficiency and competition in business, to reduce prices and to protect all Australians against unfair practices.

The Acts did not apply to State-owned utilities (nor Commonwealth utilities in the case of the Prices Justification Act).\(^{123}\)

The Prices Justification Act was repealed in 1981\(^{124}\) but was replaced by the \textit{Prices Surveillance Act 1983}, which established the Prices Surveillance Authority. The Prices Surveillance Act, like the Prices Justification Act, was introduced by a Labor Government to encourage price restraint as a counterpart to wage restraint to achieve non-inflationary economic growth.\(^{125}\)


\(^{122}\) See the second reading speech on the Trade Practices Bill 1974: \textit{Australia, Debates, House of Representatives}, 16 July 1974, p. 225 at p. 234 (Mr Enderby, Minister for Manufacturing Industry). The second reading speech also stated (at p. 226):

The Bill is especially important because of its relevance to inflation. The purpose of many restrictive trade practices is to maintain prices at levels higher than would otherwise prevail. This contributes to the inflationary trend. It also reduces the likelihood that the benefits of the Government’s tariff cuts will be passed on to the public. Increased competition from imports will be of little benefit if not accompanied by increased domestic competition. Consumer protection also assists in the fight against inflation. It is the consumer who has to bear the burden of higher prices and of unfair methods of dealing.

\(^{123}\) The TPA (but not the Prices Justification Act) was amended in 1977 to clarify that it applied to the Crown in right of the Commonwealth to the extent it engages in business. In 1979, the High Court of Australia found that the TPA did not bind the Crown in right of the States: \textit{Bradken Consolidated Ltd v BHP} (1979) 145 CLR 107.

\(^{124}\) \textit{Commonwealth Functions (Statutes Review) Act 1981}. The Prices Justification Tribunal was abolished as part of a broader review of Commonwealth functions announced by the then Prime Minister, the Rt. Hon. Malcolm Fraser. The second reading speech stated:

The Prime Minister announced some 350 decisions aimed at transferring to the private sector and the States functions more appropriately performed by them and rationalising functions which properly belong to the Commonwealth … He further said: ‘Big government concentrates power, loses perspective on its own limitations, and leaves less room for people to make their own choices’. The elimination of unnecessary costs of government is an essential ingredient of a sound and growing economy. A sound and growing economy is important to all Australians and their families.

The repeal of the Prices Justification Act was part of the ‘Government’s determination to remove unnecessary and ineffective regulation of industry’: see second reading speech on the \textit{Commonwealth Functions (Statutes Review) Bill 1981}: \textit{Australia, Debates, House of Representatives}, 27 May 1981, p. 2678 (Mr Viner, Minister for Industrial Relations and Minister Assisting the Prime Minister). The Petroleum Products Pricing Authority was established to administer the Government’s petroleum product pricing policy: \textit{Petroleum Products Pricing Act 1981}.

\(^{125}\) See the second reading speech on the Prices Surveillance Bill 1983: \textit{Australia, Debates, House of Representatives}, 30 November 1983, p. 3071 (Paul Keating, Treasurer). The Accord agreement
While Telecom and Australia Post were declared under the Prices Surveillance Act, the focus in the 1980s was on end-products and not government owned or newly privatised infrastructure services. In 1985, for example, float glass, beer, cigarettes, tea, instant coffee and concrete roof tiles were declared under the Prices Surveillance Act.

2.1.2 National Competition Policy

By the 1990s Australia was facing a low inflationary environment but a decline in relative productivity performance. Greater exposure to international competition through tariff cuts and the floating of the Australian dollar created pressure for more efficient delivery of input services.

Against the backdrop of Porter’s work, the Commonwealth, States and Territories reached agreement in 1991 on the need for a national competition policy. The first step was the establishment by the then Prime Minister (the Hon. Paul Keating) of the Independent Committee of Inquiry into Competition Policy in Australia under the chairmanship of Professor Fred Hilmer.

In its 1993 report, the Committee affirmed the importance of effective competition to maintaining and improving the welfare of Australians by increasing economic efficiency. The Committee also recognised that in some situations competition will not achieve economic efficiency or will conflict with other social objectives.

Final agreement on the NCP reforms was achieved in 1995. In particular, the reforms:

- Extended the scope of the Prices Surveillance Act and competition law provisions in Part IV of the TPA so that they applied to activity by State

with the Australian Council of Trade Unions underlay the Government’s Prices and Incomes Policy. The Prices Surveillance Authority (1985, p. 15) stated:

> With general wage restraint being exercised under the wage fixation principles established by the Australian Conciliation and Arbitration Commission, the Prices Surveillance Authority has a special responsibility to promote pricing restraint among public and private business enterprises in a matching effort directed to the objectives of economic recovery, the reduction of inflation, and expansion of employment opportunities.


The terms of reference are set out in Hilmer report, annex A.


Hilmer report, p. 6.

Three intergovernmental agreements were signed in 1995—Competition Principles Agreement (11 April 1995), Conduct Code Agreement (11 April 1995) and Agreement to Implement the National Competition Policy and Related Reforms (11 April 1995).
owned and unincorporated businesses, and tightened the process by which States can exempt conduct from Part IV. State legislation was required to overcome the constitutional limitations faced by the Commonwealth.

- Inserted Part IIIA in the TPA to establish a regime to facilitate third party access to services of certain infrastructure facilities. Part IIIA reflected the conclusion in the Hilmer report that, to introduce competition in some markets, it is necessary to regulate access to facilities that exhibit natural monopoly characteristics and to which businesses require access in order to compete in upstream or downstream markets.

- Required all governments to review legislation that restricts competition and, in respect of GBEs, to:
  - review arrangements for prices oversight (including consideration of prices oversight independent of the GBE)
  - implement competitive neutrality principles (so that GBEs do not have a competitive advantage simply as a result of their public ownership)
  - undertake certain reviews before introducing competition into a market supplied by a public monopoly, or privatising a public monopoly.

- Established the ACCC (in place of the Trade Practices Commission and Prices Surveillance Authority) to administer the TPA and Prices Surveillance Act; and the National Competition Council (NCC) to provide national oversight of the NCP.

- Provided for the Australian Government to make payments to the States and Territories conditional upon the reform commitments being met.

In 2004, following a Productivity Commission inquiry, the Prices Surveillance Act was repealed and replaced by Part VIIA of the TPA in recognition that prices surveillance had become part of Australia’s competition policy, rather than a tool to reduce inflation. Part IIIA of the TPA was amended in 2006 in response to recommendations by the Productivity Commission and the Exports and Infrastructure Taskforce designed to encourage efficient new infrastructure

---

134 See s. 51 of the TPA and clause 5 of the Conduct Code Agreement (11 April 1995).
135 Hilmer report, p. 239.
137 Agreement to Implement the National Competition Policy and Related Reforms (11 April 1995).
143 Exports and Infrastructure Taskforce (2005).
investment. The changes were reflected in an intergovernmental agreement which seeks to achieve a simpler and consistent national approach to the economic regulation of significant infrastructure.\textsuperscript{144} It is intended that Part IIIA be reviewed in five years’ time.\textsuperscript{145}

In 2008 the Federal Labor Government established Infrastructure Australia to provide advice on infrastructure issues.\textsuperscript{146} Infrastructure Australia has prepared, for the Council of Australian Governments (COAG), guidelines on public-private partnerships\textsuperscript{147}, an audit of national infrastructure\textsuperscript{148} and an infrastructure priority list to guide the allocation of the Building Australia Fund announced by the Australian Government in its 2008–09 Budget.\textsuperscript{149}

### 2.2 Current regulation

#### 2.2.1 National access regime

The objects of Part IIIA of the TPA are to:\textsuperscript{150}

(a) promote the economically efficient operation of, use of, and investment in the infrastructure by which services are provided, thereby promoting effective competition in upstream and downstream markets; and

(b) provide a framework and guiding principles to encourage a consistent approach to access regulation in each industry.

Part IIIA sets out a number of mechanisms by which access may be obtained to infrastructure services including:

- declaration and arbitration

---

\textsuperscript{144} Competition and Infrastructure Reform Agreement (10 February 2006). The National Reform Agenda, which is intended ‘to help underpin Australia’s future prosperity’, consists of three streams—human capital, competition and regulatory reform. The second stream (called the new National Competition Policy reform agenda) is:

... aimed at providing a supportive market and regulatory framework for productive investment in energy, transport and other export-oriented infrastructure, and its efficient use, by improving pricing and investment signals and establishing competitive markets.

The Competition and Infrastructure Reform Agreement forms part of that agenda. The agreement is intended to ‘provide for a simpler and consistent national system of economic regulation for nationally significant infrastructure, including for ports, railways and other export-related infrastructure’, and aims to ‘reduce regulatory uncertainty and compliance costs for owners, users and investors in significant infrastructure and to support the efficient use of national infrastructure’.

\textsuperscript{145} See Treasurer, the Hon. Peter Costello (2004).

\textsuperscript{146} Infrastructure Australia Act 2008, s. 5.

\textsuperscript{147} Infrastructure Australia (2008B).

\textsuperscript{148} Infrastructure Australia (2008A).

\textsuperscript{149} Infrastructure Australia (2008B) and (2009). See also COAG, Communique, Melbourne, 20 December 2007. COAG established seven working groups, including the Infrastructure Working Group and the Business Regulation and Competition Working Group.

\textsuperscript{150} TPA, s. 44AA.
• access undertakings and industry access codes
• certification of a State or Territory access regime
• approval of a competitive tender process for the construction and operation of a facility that is to be owned by a Commonwealth, State or Territory.

The ACCC, in making a final arbitration determination and in deciding whether to accept an access undertaking or access code, is required to have regard to certain matters including the following pricing principles:\footnote{TPA, s. 44ZZCA. In 2006 Australian governments agreed to include a similar objects clause and pricing principles in all third party access regimes for services provided by means of significant infrastructure facilities: Competition and Infrastructure Reform Agreement (10 February 2006).}

(a) that regulated access prices should:
   (i) be set so as to generate expected revenue for a regulated service or services that is at least sufficient to meet the efficient costs of providing access to the regulated service or services; and
   (ii) include a return on investment commensurate with the regulatory and commercial risks involved; and

(b) that the access price structures should:
   (i) allow multi-part pricing and price discrimination when it aids efficiency; and
   (ii) not allow a vertically integrated access provider to set terms and conditions that discriminate in favour of its downstream operations, except to the extent that the cost of providing access to other operators is higher; and

(c) that access pricing regimes should provide incentives to reduce costs or otherwise improve productivity.

Declaration and arbitration

While the Hilmer report considered that general competition law was not sufficient to resolve access issues\footnote{The Hilmer report noted (at pp. 242–45) the limitations of s. 46 of the TPA for access-seekers. See also the Federal Court decision in Queensland Wire Industries Pty Ltd v BHP (1988) ATPR 40–841, 49,076–49,077.\footnote{Hilmer report, p. 255.}}\footnote{\footnote{The Commonwealth minister or, where the service provider is a State or Territory body, the relevant State or Territory minister.}}, the declare-negotiate-arbitrate model was intended to be less interventionist than regulated outcomes and to facilitate the evolution of more market-oriented solutions over time.\footnote{Hilmer report, p. 255.}

Any person may apply to the NCC for a recommendation that a service provided by means of a facility be declared. On receiving the NCC’s view, the relevant minister\footnote{The Commonwealth minister or, where the service provider is a State or Territory body, the relevant State or Territory minister.} may declare the service provided that certain criteria are satisfied. These criteria include that:

---

\footnote{TPA, s. 44ZZCA. In 2006 Australian governments agreed to include a similar objects clause and pricing principles in all third party access regimes for services provided by means of significant infrastructure facilities: Competition and Infrastructure Reform Agreement (10 February 2006).}

\footnote{The Hilmer report noted (at pp. 242–45) the limitations of s. 46 of the TPA for access-seekers. See also the Federal Court decision in Queensland Wire Industries Pty Ltd v BHP (1988) ATPR 40–841, 49,076–49,077.}

\footnote{Hilmer report, p. 255.}

\footnote{The Commonwealth minister or, where the service provider is a State or Territory body, the relevant State or Territory minister.}
• access would promote a material increase in competition in another market
• it would be uneconomical to develop another facility to provide the service
• the facility is of national significance.155

Declaration does not prevent the provider of the declared service and a party that requests access to that service from negotiating the terms and condition of access to the service.156 However, if the parties are unable to agree, the ACCC may, upon notification of the dispute by either party, conduct an arbitration and make a determination that binds the parties.

As at 20 March 2009, declarations were in force in respect of Sydney Airport, Sydney Water Corporation, segments of the Tasmanian railway network and part of the Pilbara railway network in Western Australia.157 Two access disputes had been notified since the commencement of the regime in 1995 (in respect of Sydney Airport and Sydney Water).

**Undertakings and codes**

A provider of a service may give an undertaking to the ACCC in connection with the provision of access to the service. If the ACCC accepts the undertaking, the provider must comply with the undertaking and the service cannot be declared.158 In addition, an industry body may give a code to the ACCC setting out rules for access to a service. If the ACCC accepts the code, this facilitates the process for assessing an undertaking submitted in accordance with the code.

As at 20 March 2009, the undertakings in force related to ARTC and the former National Electricity Code.159

**State and Territory access regimes**

The Commonwealth minister may decide, on receiving the NCC’s view, that a State or Territory access regime is an ‘effective access regime’. Subject to certain exceptions, a service that is the subject of such a regime cannot be declared.

---

155 The other requirements are that access to the service can be provided without undue risk to human health or safety; access to the service is not already the subject of an effective access regime; and access would not be contrary to the public interest.


157 See the register of declarations, certifications and undertakings maintained by the ACCC under ss. 44Q and 44ZZC of the TPA. Note that the Pilbara declarations are stayed because the decisions have been appealed to the Australian Competition Tribunal.

158 If an undertaking is accepted in respect of a service that is already declared, any future arbitration determination is subject to the undertaking.

159 The status of the undertakings relating to the National Electricity Code is uncertain because the Code was replaced by the National Electricity Rules in 2005.
As at 20 March 2009, the certifications in force related to the former national and Western Australian gas access regimes\textsuperscript{160}, the Western Australia and Northern Territory electricity regimes and the South Australian and Northern Territory regimes governing access to railway infrastructure between Tarcoola and Darwin.\textsuperscript{161}

**Competitive tendering**

A Commonwealth, State or Territory minister may apply to the ACCC for approval of a tender process for the construction and operation of a facility that is to be owned by the Commonwealth, State or Territory. If the process is approved, the service cannot be declared under Part IIIA. As at 20 March 2009, no competitive tendering application had been submitted.

### 2.2.2 Competition law

Broadly, Part IV of the TPA prohibits the following anti-competitive practices:

- anti-competitive agreements, price-fixing, and exclusionary agreements\textsuperscript{162}
- secondary boycotts\textsuperscript{163}
- misuse of market power
- resale price maintenance
- exclusive dealing\textsuperscript{164}
- mergers that substantially lessen competition in a market.

In some cases, conduct is prohibited in all circumstances (such as price fixing) whereas in others it is prohibited only where it will substantially lessen competition. The TPA also recognises that broader objectives are not always met by competitive markets. Most conduct can be exempted from Part IV through the processes of authorisation, notification or clearance under Part VII of the TPA\textsuperscript{165}.

\textsuperscript{160} The National Third Party Access Code for Natural Gas Pipeline Systems was replaced by the National Gas Rules in 2008.

\textsuperscript{161} The certification of the Victorian access regime for commercial shipping channels ceased to have effect five years after it was granted in 1997.

\textsuperscript{162} An exclusionary agreement (sometimes referred to as a primary boycott) is an agreement between competitors to restrict the supply (or acquisition) of goods or services to (from) particular persons (e.g. a market sharing agreement).

\textsuperscript{163} In summary, a secondary boycott is where third parties impose a boycott on one person, in order to damage the business of another person.

\textsuperscript{164} In summary, exclusive dealing occurs if: a party supplies goods or services on the condition that the purchaser: does not acquire goods or services from a competitor; or acquires other goods or services from a third party (also referred to as third line forcing); or a party acquires goods or services on the condition that the supplier does not supply to a third party.

\textsuperscript{165} State and Territory legislation may also exempt conduct from Part IV of TPA (s. 51).
2.2.3 Prices surveillance

The object of Part VIIA of the TPA is to\(^{166}\):

have prices surveillance applied only in those markets where ... competitive pressures are not sufficient to achieve efficient prices and protect consumers.

Part VIIA sets out three mechanisms for prices surveillance—price notifications, monitoring and inquiries.

Price notifications

The Commonwealth minister (or the ACCC with the approval of the minister) may declare goods or services to be ‘notified goods or services’, and a person, in relation to those goods or services, to be a ‘declared person’.

In effect, a declared person supplying a notified good/service cannot increase the price of that good/service without notifying the ACCC (a ‘locality notice’). The price may be increased if the ACCC states that it does not object or, if the ACCC objects, a prescribed period of time has ended.

As at 20 March 2009, certain services provided by Sydney Airport, Airservices Australia and Australia Post were declared.

Monitoring and inquiries

The Commonwealth minister may direct the ACCC to monitor and report on the prices, costs and profits relating to the supply of certain goods or services, or require the ACCC or another body to hold an inquiry into the supply of specified goods or services.

As at 20 March 2009, Sydney, Melbourne, Brisbane, Perth and Adelaide airports and container terminal operators at the ports of Adelaide, Brisbane, Burnie, Fremantle, Melbourne and Sydney were subject to price monitoring.

\(^{166}\) TPA, s. 95E.
3. Telecommunications

This section focuses on telecommunications services (broadly, communication over a distance using electromagnetic energy and facilities such as metal or optical fibre cable, satellite or radio). However, the boundaries between this sector and the broadcasting, computing and entertainment industries continue to blur through convergence of technologies and services. This section describes the historical regulation of telecommunications services in Australia, and the current regime.

3.1 Background

In Australia, until 1991, the supply of telecommunications transmission infrastructure and the carriage of telecommunications over that infrastructure were a statutory monopoly. In the second reading speech on the Post and Telegraph Bill 1901, the Postmaster-General stated:

I should like to mention one fact in connexion with the telegraph monopoly, and that is that it allows us to look ahead; take advantage of every invention and adapt it to the benefit of the public. If the telegraph service had been in the hands of a private proprietary, I am inclined to think that it would have fought very much against the introduction of the telephone service …

From Federation until 1975, the Postmaster-General’s Department supplied Australian domestic telecommunications services. The Overseas Telecommunications Commission (OTC), established in 1946, was given responsibility for Australia’s overseas telecommunications.

The Department was replaced in 1975 by two separate authorities—one to operate postal services (Australian Postal Commission, trading as Australia Post) and the other to operate telecommunications services (Australian Telecommunications Commission, Telecom). The Postmaster-General, in the second reading speech on the Postal Services Bill 1975, stated:

[T]he Commission pointed out that the basis for the provision of the two different services by one organisation was an historical development in Australia and that

---

167 See the definition of ‘telecommunications network’ in Telecommunications Act 1997, s. 7.
168 See, for example, the access regime for digital radio multiplex transmitter licences set out in the Radiocommunications Act 1992 (inserted by the Broadcasting Legislation Amendment (Digital Radio) Act 2007).
169 See second reading speech on the Post and Telegraph Bill: Australia, Debates, Senate, 6 June 1901, p. 763 (Senator Drake, Postmaster-General).
170 Post and Telegraph Act 1901.
171 Overseas Telecommunications Act 1946.
the prevailing trend overseas is for postal and telecommunications services to be substantially separate in their management.

… For both services, charged as they are with such important responsibilities on behalf of the people of Australia, a degree of freedom of management is considered most important. It is believed that this can be provided best by operation as a commission rather than as a department within the Public Service. This also gives the opportunity for people outside the day to day management to bring their experience to bear, as commissioners, on the complex problems of the separate businesses. The Minister responsible for the commissions will however retain control in a number of key areas.

The *Satellite Communications Act 1984* put in place the framework for the commencement of satellite services in 1985 by AUSSAT Pty Ltd (a private company incorporated in 1981 and owned by the Commonwealth and Telecom to provide satellite services to Australia). These services were aimed particularly at the remote and outback regions of Australia. Under the Act, AUSSAT operated as a commercial, tax-paying enterprise. To protect Telecom’s services, the Act prohibited AUSSAT from providing public switched telephone services or public switched data services.

In 1984 Telecom was declared under the Prices Surveillance Act and was required to notify the Prices Surveillance Authority of a proposed increase in price for certain telephone and telegraph services. It was intended that the goods and services subject to surveillance would be those where ‘effective competitive disciplines are not present and where price or wage decisions have pervasive effects throughout the economy.’

As a result of a 1988 inquiry, Telecom and OTC were corporatised. The *Telecommunications Act 1989* established the Australian Telecommunications

---


177 Prices Surveillance Authority (1984A, p. 5). The declarations made at that time covered petroleum products, the transmission of standard postal articles and registered publications by ordinary post and certain telephone and telegraph services.

178 Eight public enterprises were involved in the Australian Government’s GBE reform program: Qantas, Australian Airlines, Australian National Line, Australian National Railways Commission, Telecom, OTC, AUSSAT and Australia Post. The package of reforms aimed to alter the relationship between the enterprises and the government by putting them more at arm’s length, making them responsive to consumer needs and improving their efficiency. See Minister for Transport and Communications, Senator the Hon. Gareth Evans QC (1988A) and (1988B); and Minister for Transport and Communications, The Hon. Ralph Willis, MP (1989).

179 *Australian Telecommunications Corporation Act 1989; OTC (Conversion to Public Company) Act 1988*. 
Authority (AUSTEL) as an independent regulator.\textsuperscript{180} The monopoly supply of telecommunications infrastructure and basic services continued, to\textsuperscript{181}:

secure the orderly and efficient development of the basic telecommunications network by taking advantage of the economies of scale and scope that exist in the industry, and by avoiding costly and uneconomic duplication of facilities that can be most efficiently provided by a single supplier.

The Government also referred to the need to allow for Telecom to average its prices and practice some cross subsidy to fund community service obligations (universal service). However, limited competition was introduced for the provision of value-added services, private networks, customer equipment and cable installation. This was intended to be a ‘step towards making the telecommunications sector stronger and more able to compete on an international level’.

At the end of 1990, the Government announced further major reforms to the telecommunications regulatory regime\textsuperscript{182}:

Central to the Government’s strategy for the continuing development of the telecommunications industry is the realisation that to survive and prosper in the international market place, Australia needs to foster new attitudes, and to underpin them by vigorous competition. … Domestic rivalry will stimulate the carriers to innovate and improve, giving them a competitive edge in world markets.

Telecom and OTC were merged to form the Australian and Overseas Telecommunications Corporation (AOTC)\textsuperscript{183} (renamed Telstra Corporation Ltd in 1994).\textsuperscript{184} AUSSAT was privatised and sold to Optus Networks Pty Ltd.\textsuperscript{185} The \textit{Telecommunications Act 1991} allowed the creation of a general carrier duopoly (Telstra and Optus) to end on 30 June 1997 and the granting of three public mobile operator licences (Telstra, Optus and Vodafone). AUSTEL continued to administer industry-specific competition regulation\textsuperscript{186} and certain activities were exempt from Part IV of the TPA.\textsuperscript{187} In relation to the proposed sunset clause of 30 June 1997 for the new carrier arrangements, the Government stated\textsuperscript{188}:

There needs to be a strong incentive for the second carrier to ensure rapid and effective investment and to establish itself firmly as a credible competitor. There also needs to be a strong incentive for Telecom/OTC to restructure itself quickly to meet the demands of a competitive market place. These can be provided most effectively if both carriers know from the outset that the duopoly will end after the

\textsuperscript{180} \textit{Telecommunications Act 1989}, s. 16.


\textsuperscript{182} Minister for Transport and Communications, Kim C. Beazley MP (1990, Foreword).

\textsuperscript{183} \textit{Australian and Overseas Telecommunications Corporations Act 1991}.

\textsuperscript{184} \textit{Transport and Communications Legislation Amendment Act 1994}, Schedule 1.

\textsuperscript{185} \textit{AUSSAT Repeal Act 1991}.

\textsuperscript{186} The 1991 Act required a ‘dominant carrier’ to charge only in accordance with filed tariffs and not to discriminate between acquirers of telecommunications services unless justified on cost grounds.

\textsuperscript{187} \textit{Telecommunications Act 1991}, ss. 236 and 237.

\textsuperscript{188} Minister for Transport and Communications, Kim C. Beazley MP (1990, p. 14).
second carrier has been given a period of time to become established in the marketplace.

The regulatory regime introduced in 1991 was intended to be transitional. In 1997, following a review initiated in 1994:

- Restrictions on the number of licences that could be issued were removed.
- One-third of Telstra was privatised (with a further one-sixth privatised in 1999).\(^{190}\)
- The exemption from Part IV of the TPA was removed and the TPA was amended to introduce a telecommunications-specific competition (Part XIB) and access (Part XIC) regime.\(^ {191}\)
- Economic regulation was transferred from the industry-specific regulator (AUSTEL) to the ACCC.
- The Australian Communications Authority (ACA) was established by the merger of AUSTEL and the Spectrum Management Agency (SMA) to manage technical regulation, consumer issues and radiocommunications. In 2005 the ACA was replaced by the Australian Communications and Media Authority (ACMA) through the merger of the ACA and Australian Broadcasting Authority.

The new Parts XIB and XIC of the TPA, which were based on Parts IIIA and IV, were intended to be less ‘interventionist’ than the previous regime but still contain ‘industry-specific features’ to ‘reduce the damage that can be inflicted by those wielding … market power’. The second reading speech stated:\(^{192}\)

[T]here remain good reasons for there to continue to be industry specific competition regulation for telecommunications. The removal of regulatory barriers to entry does not automatically result in the appearance of normal competitive market structures. Telstra continues to wield significant market power derived primarily from its historical monopoly position. There is also scope for incumbent operators generally to engage in anti-competitive conduct because competitors in

---

\(^{189}\) See Minister for Communications and the Arts, Michael Lee (1994) and (1995); and Minister for Communications and the Arts, Senator the Hon. Richard Alston (1996).

\(^{190}\) Under the *Telstra (Dilution of Public Ownership) Act 1997*, the Commonwealth sold one-third of its equity interest in Telstra. The *Telstra (Further Dilution of Public Ownership) Act 1999* enabled the Commonwealth to reduce its interest to 50.1 per cent.

\(^{191}\) *Trade Practices Amendment (Telecommunications) Act 1997*. Parts XIB and XIC were later amended by the *Telecommunications Legislation Amendment Act 1999* and *Trade Practices Amendment (Telecommunications) Act 2001*. Among other things, the 1999 amendments to Part XIC allowed the ACCC to: issue directions in relation to negotiations; make an interim arbitration determination; and backdate a final determination. The 2001 amendments: required the ACCC to determine pricing principles at the time a service is declared; and allowed the ACCC to publish an arbitration determination.

downstream markets depend on access to the carriage services controlled by them. … The fast pace of change and complex nature of horizontal and vertical arrangements of firms operating in this industry mean that any anti-competitive behaviour could cause rapid damage to the competition that has already developed and severely hamper new entry.

The rules were intended to be aligned eventually with general trade practices law. The TPA required a review of Part XIB to be undertaken before 1 July 2000.

Following a Productivity Commission review, Parts XIB and XIC of the TPA were retained but amended in 2002 to facilitate investment and to require greater accounting separation between Telstra’s wholesale and retail operations.

In 2005, following a review in advance of a proposed sale of a further share of Telstra, the Government announced:

- A $1.1 billion investment in regional communications services (Connect Australia) and the establishment of a $2 billion Communications Fund to generate revenue to fund services in the future.

- Legislative amendments to introduce an ‘operational separation’ framework for Telstra and allow the sale of the Government’s remaining shareholding in Telstra.

- A further review of the regulatory regime in 2009.

---


194 TPA, s. 151CN.


196 Telecommunications Competition Act 2002. Among other things, the Act amended Part XIC of the TPA to: allow exemption applications and undertakings to be submitted without the service being declared; remove merits review of arbitration determinations and introduce merits review for undertaking decisions; and require the ACCC to issue model terms and conditions for core telecommunications services.

197 Minister for Communications, Information Technology and the Arts, Senator the Hon. Helen Coonan, Connect Australia (Media release, 17 August 2005).

198 Telecommunications Legislation Amendment (Competition and Consumer Issues) Act 2005. Operational separation is ‘designed to ensure that Telstra, as the dominant carrier, treats all other carriers on a fair and transparent basis’. The model is intended to provide ‘a sound approach to achieve transparency, without the risks of forced structural separation’. See second reading speech on the Telecommunications Legislation Amendment (Competition and Consumer Issues) Bill 2005: Australia, Debates, Senate, 8 September 2005, p. 41 (Senator Coonan, Minister for Communications, Information Technology and the Arts). The effectiveness of this form of ring fencing has been contentious. See, for example, Australia, Senate Committee on Economics, Budget Estimates (Hansard), 5 June 2008, E57-58 (comments by Graeme Samuel, Chairman, ACCC).

In 2007 the current Rudd Labor Government, in its election policy, proposed to facilitate a national broadband network by investing up to $4.7 billion in a public-private partnership. The initiative, which may replace much of the existing telecommunications network, is intended to ‘help position Australia as a competitive, innovative, knowledge-based economy that can compete and win in global markets’.  

3.2 Current regulation

The main object of the 1997 reforms is to provide a regulatory framework that promotes:

(a) the long-term interests of end-users of carriage services or of services provided by means of carriage services; and

(b) the efficiency and international competitiveness of the Australian telecommunications industry.

The economic regulation of telecommunications services consists of the following components.

3.2.1 Competition law

Part XIB of the TPA prohibits carriers and carriage service providers from engaging in anti-competitive conduct (the competition rule). Part XIB is similar to Part IV but carriers and services providers are subject to an additional prohibition against taking advantage of market power with the effect of substantially lessening competition. In addition, in order for proceedings to be instituted under Part XIB (by the ACCC or a third party), the ACCC must issue a ‘competition notice’. In certain cases, a competition notice reverses the evidentiary burden in a court proceeding.

Explanatory memorandum, Telecommunications Legislation Amendment (Competition and Consumer Issues) Bill 2005, p. 13. See also s. 61A of the Telecommunications Act 1997, which requires a review of the conditions relating to the operational separation of Telstra.

Federal Labor leader, Kevin Rudd MP, and shadow Minister for Communications and Information Technology, Lindsay Tanner MP (2007, executive summary).

Telecommunications Act 1997, s. 3(1). Additional objects such as ensuring various social imperatives and performance standards are achieved are set out in s. 3(2).

A ‘carrier’ is an owner of a network unit that is used to supply carriage services to the public: TPA, s. 151AB and Telecommunications Act 1997, s. 7 and Part 3.

Service providers are divided into two categories: carriage service providers and content service providers: Telecommunications Act 1997, s. 86. A carriage service provider supplies carriage services (e.g. phone or internet access services) to the public using network units owned by a carrier: Telecommunications Act 1997, s. 87. A content service provider supplies content services (e.g. a pay TV service) to the public: Telecommunications Act 1997, s. 97.

TPA, s. 151AK.

TPA, s. 151AJ.

TPA, s. 151AN (where the ACCC has issued a ‘Part B competition notice’).
3.2.2 Access regime

The telecommunications access regime consists of two components: Part XIC of the TPA, which governs access to services, and Schedule 1 of the *Telecommunications Act 1997*, which governs access to facilities.

Access to services

Part XIC of the TPA governs access to ‘listed carriage services’ and services that facilitate the supply of listed carriage services. In summary, a listed carriage service is a service for carrying communications (including voice and data) by means of guided and unguided electromagnetic energy between certain points.\(^{208}\)

Under Part XIC, if such a service is ‘declared’ by the ACCC\(^{209}\), a provider of that service is required to comply with ‘standard access obligations’, including an obligation to supply the service to an access seeker (subject to certain exceptions).\(^{210}\) In common with Part IIIA, failing agreement (and in the absence of an undertaking), the terms and conditions of access are determined by the ACCC acting as arbitrator.\(^{211}\) Part XIC also provides for:

- the ACCC to determine (non-binding) pricing principles at the time a service is declared\(^{212}\) and model terms and conditions for certain ‘core services’.\(^{213}\)
- the ACCC to grant specified carriers or carriage service providers exemptions from the standard access obligations.\(^{214}\)
- the ACCC to accept special access undertakings and grant anticipatory exemptions for services that are not yet declared or supplied (to facilitate investment in new telecommunications infrastructure).\(^{215}\)
- the minister to make a determination setting out pricing principles (which apply to undertaking and arbitration decisions).\(^{216}\)

As at 1 January 2008, 115 telecommunications access disputes had been notified since the commencement of the regime in 1997.\(^{217}\)

---

\(^{208}\) *Telecommunications Act 1997*, ss. 7 and 16.

\(^{209}\) TPA, s. 152AL. The ACCC was also required to deem certain services to be declared services.

\(^{210}\) TPA, s. 152AR.

\(^{211}\) TPA, s. 152AY.

\(^{212}\) TPA, s. 152AQA.

\(^{213}\) TPA, s. 152AQB.

\(^{214}\) TPA, ss. 152AS and 152AT.

\(^{215}\) TPA ss. 152ASA, 152ATA and 152CBA.

\(^{216}\) TPA, s. 152CH.

\(^{217}\) In contrast, as at 20 March 2009, three access disputes had been notified in respect of airport, gas transmission and sewerage services.
Access to facilities

The *Telecommunications Act 1997* requires owners of network units used to supply carriage services to hold a carrier licence granted by ACMA (subject to certain exceptions). The holder of a carrier licence is known as a carrier. Carrier licences are subject to conditions, including the conditions specified in Schedule 1 to that Act. In summary, Schedule 1 requires a carrier to:

- provide other carriers with access to exchanges, pillars and other supplementary facilities (Part 3)\(^ {218} \)
- provide other carriers with network information (Part 4)
- provide other carriers with access to ducts and towers (Part 5)\(^ {219} \)
- obtain an interconnection service from a carriage service provider that is interconnected with the carrier’s network (to ensure any-to-any connectivity) (Part 7).

Under these Parts, if the parties are unable to agree upon either the terms and conditions upon which the requirement is complied or on the appointment of an arbitrator, the ACCC acts as arbitrator.\(^ {220} \) The *Telecommunications (Arbitration) Regulations 1997* governs the conduct of arbitrations by the ACCC under Schedule 1.

In addition, under Part 5 of Schedule 1, the ACCC may make a code setting out conditions with which carriers must comply. In 1998 the ACCC made a facilities access code governing access to certain telecommunications facilities owned by carriers, including mobile towers and underground ducts.\(^ {221} \)

If a carrier contravenes Schedule 1\(^ {222} \), the minister, the ACMA (except in respect of Parts 3 and 4, and certain breaches of Part 1) or the ACCC may institute proceedings in the Federal Court to recover a civil penalty.\(^ {223} \)

---

\(^ {218} \) Part 3 requires carriers to provide other carriers with access to facilities to provide competitive facilities and competitive carriage services, or establish their own facilities. This includes any part of the infrastructure of a telecommunications network (or other things used in connection with the network), land, buildings, and customer equipment or cabling connected to the network.

\(^ {219} \) Part 5 requires carriers to provide other carriers with access to telecommunications transmission towers, the sites of such towers and underground facilities that are designed to hold lines, so that the carrier can install a facility connected with the supply of a carriage service (in the case of telecommunications transmission towers and sites, the carriage service must be supplied by means of radiocommunications).

\(^ {220} \) *Telecommunications Act 1997*, Schedule 1 clauses 18, 27, 29, 36 and 46.


\(^ {222} \) *Telecommunications Act 1997*, s. 68.

\(^ {223} \) *Telecommunications Act 1997*, ss. 570 and 571.
3.2.3 Operational separation

Operational separation is implemented as a statutory condition of Telstra’s carrier licence. Telstra was required to prepare a draft operational separation plan, which was approved by the minister on 23 June 2006. The plan includes a requirement to maintain separate wholesale, retail, and network business units, and establishes internal wholesale pricing mechanisms for Telstra to ensure its retail businesses receive no more favourable treatment than its wholesale customers.

3.2.4 Information provision

Part XIB of the TPA allows the ACCC to issue tariff filing directions to certain carriers and carriage service providers and make rules requiring carriers and carriage service providers to keep and retain records. The ACCC is also required to report each year on competitive safeguards within the telecommunications industry and monitor charges for listed carriage services.

3.2.5 Consumer safeguards

The regulation of wholesale infrastructure services is affected by the regulation of end-user services. Consumer safeguards include: the universal service obligation (USO) to provide reasonable access to basic telephone, payphone and digital data services; access to untimed local calls; and price controls on Telstra. The cost of providing the USO is calculated annually by the Government, and all carriers are required to contribute to USO costs, in proportion to their revenues, as a condition of their licence.

---

224 The *Telecommunications Act 1997* requires carriers to be licensed by ACMA (s. 42) and to comply with licence conditions specified in Schedule 1 to that Act (s. 61). Part 8 of Schedule 1 required Telstra to prepare and give to the minister for approval a draft operational separation plan, which must be directed towards the achievement of the aim and objectives of operational separation. Telstra submitted its draft OSP to the minister on 3 April 2006.

225 TPA, s. 151BK. Telstra is also required to notify the ACCC of proposed changes to charges for basic carriage services (s. 151BTA).

226 TPA, s. 151BU.

227 TPA, s. 151CL.

228 TPA, s. 151CM. The ACCC is also required to monitor Telstra’s compliance with Part 9 of the *Telecommunications (Consumer Protection and Service Standards) Act 1999* (which deals with price control arrangements for Telstra).

229 *Telecommunications (Consumer Protection and Service Standards) Act 1999*.

230 The current price controls determined by the minister under Part 9 of that Act commenced on 1 January 2006 and expire on 30 June 2009: *Telstra Carrier Charges—Price Control Arrangements, Notification and Disallowance Determination No. 1 of 2005*. 

ACCC/AER working paper No 1, July 2009 37
4. Postal services

The term ‘postal services’ broadly covers several distinct activities which are typically combined: collection, outward sorting, transport, inward sorting and final delivery of postal items. However, there is not a clear dividing line between a postal network and other delivery or communications services such as those offered by freight forwarders. This section describes the historical regulation of postal services in Australia, and the current regime.

4.1 Background

Following Federation, the Commonwealth Postmaster-General’s Department had a monopoly over the carriage of all letters weighing up to one pound. In the second reading speech, the Postmaster-General stated:

> With regard to letters and telegrams, the postal business is a strict State monopoly, and I think I may claim that the success that has attended the operations of the post office, not only in British communities, but all over the world, has thoroughly justified the principle of State monopoly, as applied to that particular department. … This is a department that exercises a most important influence on the whole of the community. It is closely connected with the political, the commercial, the industrial and the social life of the community … .

A uniform one penny charge was introduced in 1911 for the carriage of such letters.

The Department was replaced in 1975 by two separate authorities—one to operate postal services (Australian Postal Commission, trading as Australia Post) and the other to operate telecommunications services (Australian Telecommunications Commission, Telecom).

In 1983 the scope of Australia Post’s monopoly was reduced by allowing competitors to carry letters provided they charged at least ten times the standard letter rate.

---

233 See Hunter (2000, Chapter 4).
234 Postal Services Act 1975 and Telecommunications Act 1975. The Acts followed the Australian Post Office Commission of Inquiry (1974). The second reading speech pointed out that it was in accordance with overseas practice to make postal and telecommunications services separate in their management. Management by a commission rather than as a government department was intended to utilise the experience of parties outside the Public Service and provide greater freedom of management. The minister responsible for the commissions was to retain control in a number of key areas. See second reading speech on the Postal Services Bill 1975: Australia, Debates, Senate, 23 April 1975, p. 1256 at pp. 1257-1258 (Senator Bishop, Postmaster-General).
Australia Post was required to notify the Prices Surveillance Authority of a proposed increase in price for standard postal articles and registered publications. In 1989, as part of the Australian Government’s GBE reform program, Australia Post was ‘corporatised’ but remained in full public ownership. The legislation (including the new *Australian Postal Corporation Act 1989*): established the Australian Postal Corporation in place of the Commission; required Australia Post to provide a letter service for standard postal articles in Australia at a uniform rate of postage (‘community service obligations’); conferred a monopoly on Australia Post for the provision of certain letter services (‘reserved services’); and required Australia Post to perform its functions ‘in a manner consistent with sound commercial practice’.

In 1992 Prices Surveillance Authority scrutiny was extended to all services reserved to Australia Post and the carriage within Australia of registered publications. In 1994, the scope of Australia Post’s monopoly was reduced to provide greater opportunities for private mail operators to develop value-added services and niche markets in express mail, time sensitive and higher value bulk business markets. The Australian Postal Corporation Act was also amended to provide for the ACCC to inquire into disputes in respect of Australia Post’s bulk interconnection services (Australia Post was exempted from the 1995 national access regime in Part IIIA of the TPA).

In 2000, following a review by the NCC, the Government introduced a Bill to convert Australia Post to a Corporations Law company, further reduce the scope of Australia Post’s reserved services and insert a postal access regime in the TPA. The Bill was later withdrawn and replaced by the *Postal Services Legislation Amendment Act 2004*, which introduced new record keeping requirements in part to identify any...

---

236 Declaration under the *Prices Surveillance Act 1983* dated 13 March 1984 (*Commonwealth of Australia Gazette*, No. s. 106, 15 March 1984, p. 2). The declarations made at that time covered petroleum products; the transmission of standard postal articles and registered publications by ordinary post; and certain telephone and telegraph services. The Prices Surveillance Authority referred to the government policy that those goods and services to be subject to surveillance would be those where ‘effective competitive disciplines are not present and where price or wage decisions have pervasive effects throughout the economy’: see Prices Surveillance Authority (1984A, p. 5).

237 See footnote 178.


239 Following a review by the Industry Commission of the mail, courier and parcel industries: Industry Commission (1992A).


241 *Australian Postal Corporation Amendment Act 1994*.

242 *Australian Postal Corporation Act 1989*, s. 32D.

243 National Competition Council (1998A).

244 See second reading speech on the Postal Services Legislation Amendment Bill 2000: Australia, *Debates*, House of Representatives, 6 April 2000, p. 15392 (Peter McGauran, Minister for the Arts and the Centenary of Federation).
cross-subsidies between Australia Post’s reserved services and the services that it provides in competition with other businesses.

4.2  Current regulation

The economic regulation of postal services in Australia has three main components: prices surveillance; access regime in respect of bulk mail services; and monitoring and record keeping.

4.2.1  Prices surveillance

Under Part VIIA of the TPA, Australia Post must notify the ACCC if it proposes to increase the price of\textsuperscript{245}:

- a letter service reserved to Australia Post under the Australian Postal Corporation Act or

- the carriage within Australia of registered publications.

The minister may also disapprove changes to the rates of postage for the carriage within Australia of standard postal articles by ordinary post.\textsuperscript{246}

4.2.2  Access regime

Under Part 4 of the Australian Postal Corporation Act and Part 3 of the Australian Postal Corporation Regulations 1996, a person who requests a ‘bulk interconnection service’ from Australia Post is able to notify the ACCC of a dispute. After conducting an inquiry, the ACCC must provide a report to the minister who may then direct Australia Post to act in accordance with a recommendation in the report. As at 20 March 2009, no disputes had been notified.

4.2.3  Monitoring and record keeping

Part 4A of the Australian Postal Corporation Act allows the ACCC to require Australia Post to keep records and to provide those records to the ACCC in relation to:

- the ACCC’s functions in relation to prices surveillance and inquiries into disputes about bulk mail services

- reserved services and the financial relationship with other parts of Australia Post’s business.

In March 2005 the ACCC released a record keeping rule that requires Australia Post to provide annual financial reports for defined service groups.\textsuperscript{247}

\textsuperscript{245} Declaration No. 75 under the Prices Surveillance Act 1983 (Commonwealth of Australia Gazette, No. GN 6, 12 February 1992, p. 419).

\textsuperscript{246} Australian Postal Corporation Act 1989, s. 33.

\textsuperscript{247} See www.accc.gov.au/content/index.phtml/itemId/507225 (accessed 17 March 2009).
5. Airports

The primary function of airports is to provide for planes to land and depart, and to facilitate the interchange of passengers and freight between air and surface transport. The services provided at airports can be categorised as essential operational (e.g. air traffic control, runways and security), handling (e.g. passenger and freight processing and the provision of power and fuel) and commercial (e.g. retail outlets and conference centres). Airport facilities can be categorised as landside (e.g. terminals and perimeter roads) and airside (e.g. runway, hangars, freight terminals and facilities for aircraft maintenance and refuelling). This section describes the historical regulation of airports in Australia, and the current regime.

5.1 Background

In contrast to telecommunications and postal services, the Commonwealth Constitution does not refer to aviation. The Commonwealth’s involvement in airports followed World War I and the International Convention for the Regulation of Aerial Navigation (1919). The Civil Aviation Branch was established within the Commonwealth Department of Defence in 1920. In the second reading speech on the Air Navigation Bill, Senator Pearce, then Minister for Defence, stated:

But, lest there should be any doubt upon the point, it was brought before the State Governments, who at once recognised that this is essentially a subject for Federal control; that it would be impossible to create artificial State boundaries in the air; that it is desirable that any legislation upon this matter be of a uniform character, and should be centralized.

In addition to licensing private airlines and aerodromes, the Civil Aviation Branch commenced the acquisition of sites for Commonwealth owned-airports.

---

In 1945 a government-owned airline (Australian National Airlines Commission) was established\textsuperscript{251}, although the High Court overruled the provisions giving the Commission a monopoly over interstate air services.\textsuperscript{252} In 1957, following the collapse of a major privately owned carrier\textsuperscript{253}, the two airline policy was enacted which limited the main domestic carriers to the Commission and a private carrier (Ansett).\textsuperscript{254} The rationale was explained in the minister’s second reading speech\textsuperscript{255}:

The aim of the 1952 Act was to keep two major trunk route operators … in vigorous and fair competition and to ensure the efficient and economical operation of air services within Australia. … Notwithstanding these measures, it had become apparent early in 1957 that the financial position of the private airlines … had deteriorated to the point where their continued existence was at stake.

… This policy … is the same in concept as that embodied in the 1952 Civil Aviation Agreement; that of providing fair and equal conditions of competition for two major airlines. The Government indicated that … it was proposed to eliminate the wasteful effects of uneconomic competition on trunk routes by strengthening the rationalization provisions of the Civil Aviation Agreement. Under these conditions the Government believed—and still believes—that the trunk route operators will be able to make profits and yet provide at the same time the efficient type of service for which the Australian airlines are noted.

International services were provided by Qantas\textsuperscript{256}, the shares of which had been purchased by the Commonwealth in 1947.

In 1985 the Government announced the transfer of Commonwealth airports (capital city and some regional airports) from the Department of Aviation to a statutory enterprise, the Federal Airports Corporation (FAC). The transfer followed the Bosch inquiry into aviation cost recovery.\textsuperscript{257} The subsequent legislation was intended to establish an organisation more able to respond to changing industry needs\textsuperscript{258}:

Departments of state are of necessity bound by the Government processes which inhibit commercial flexibility and responsiveness. The aviation industry has been critical of this fact and of the inability of the current administrative processes to make changes in a timely manner to meet the requirements of a dynamic market. Additionally, governments in the past have unduly influenced the priorities for aviation infrastructure development for reasons unrelated to economics or efficiency. Indeed many of the decisions taken in the past have inhibited economy and efficiency in the industry.

\begin{itemize}
\item \textsuperscript{251} \textit{Australian National Airlines Act 1945}.
\item \textsuperscript{252} Following a challenge by a private carrier: \textit{Australian National Airways Pty Ltd v Commonwealth} (1945) 71 CLR 29.
\item \textsuperscript{253} Australian National Airways.
\item \textsuperscript{254} \textit{Civil Aviation Agreement Act 1957}.
\item \textsuperscript{255} Second reading speech on the Civil Aviation Agreement Bill 1957: Australia, \textit{ Debates}, House of Representatives, 27 November 1957, p. 2603 (Mr Osborne, Minister for Air).
\item \textsuperscript{256} Originally, the Queensland and Northern Territory Aerial Services Pty Ltd.
\item \textsuperscript{257} Independent Inquiry into Aviation Cost Recovery (1984).
\item \textsuperscript{258} Second reading speech: Australia, \textit{ Debates}, House of Representatives, 13 November 1985, p. 2692 (Peter Morris, Minister for Transport and Minister for Aviation).
\end{itemize}
This legislation will go a long way towards rectifying these problems and will enable the Corporation to act more readily to meet the changing needs of the travelling public and the aviation industry.

FAC began operations on 1 January 1988. While it was expected to operate on a commercial basis, FAC was required, prior to imposing or varying an aeronautical charge, to notify the minister who could disapprove the proposed charge.

In 1987, following the Independent Review of Economic Regulation of Domestic Aviation, the Government decided to end the two airline policy in 1990 and transfer safety regulation from the Department to the proposed Civil Aviation Authority (CAA). In contrast to telecommunications, the Government decided not to set up a specialist agency to deal with the process of deregulation, or to enact any aviation-specific competition controls. Long-term (30-year) terminal leases were granted to the two incumbent airlines (Australian National Airlines Commission and Ansett). However, the leases included provision for access to terminal facilities by other operators. In 1988, as part of the Government’s ongoing GBE reform program, the Commission was converted to a public company (Australian Airlines Ltd) but remained in full public ownership.

In 1990, in response to capital requirements of Australian Airlines and Qantas to upgrade airline fleets, the Government announced that it would sell 100 per cent of its equity in Australian Airlines and 49 per cent of its interest in Qantas. The minister stated:

All institutions we are discussing here today have gone through different transformations in their time and have confronted different market circumstances. We are merely at a way station at this conference in dealing with their contemporary circumstances. …

This proposal is standard, average, common-sense, democratic socialist policy of how one manages government business enterprises. The Labor Party does not stand, and has not for years stood for monopoly. … That is why we are not the now defunct eastern European communist parties.

In 1991 FAC’s aeronautical services and CAA’s air traffic services were declared under s. 21 of the Prices Surveillance Act. Declaration was intended to ensure that

---

259 Federal Airports Corporation Act 1986, s. 7.
260 Federal Airports Corporation Act 1986, s. 56.
262 Department of Transport and Communications—Flight Standards Division.
264 See footnote 178.
267 Declaration No. 65 under the Prices Surveillance Act 1983 dated 5 April 1991. Declaration required FAC to notify the Prices Surveillance Authority before raising its aeronautical charges. In 1992, following recommendations from the Industry Commission’s inquiry into intrastate aviation and Prices Surveillance Authority concerns arising from the second FAC price notification, the Prices
‘these monopolies become more efficient and that such gains are reflected in their pricing systems’.

In 1992, so that Qantas could bid for Australian Airlines, the Government decided to remove the barriers between Australia’s domestic and international aviation sectors and restrictions on equity investments between Australian airlines. The Government considered that substantial synergistic benefits and operational efficiency gains could be achieved if Qantas and Australian Airlines were to be combined into a single entity. The purchase of Australian Airlines by Qantas was completed in September 1992. Following the collapse of a new entrant (Compass Mk 1) in 1991 and an investigation by the Trade Practices Commission, the Government also decided to support the development by FAC of common-user terminals to facilitate new entry. The full privatisation of Qantas was announced later in 1992.

In 1995 CAA was split into two entities. A new Commonwealth statutory body (Airservices Australia) was established with responsibility (statutory monopoly) for air traffic services. The Civil Aviation Safety Authority took on the technical regulatory role. Airservices Australia’s proposed price increases continue to be reviewed by the ACCC under Part VIIA of the TPA.

After the enactment in 1996 of the Airports Act the privatisation of FAC airports commenced through long-term leases for each airport. The successful lessee was determined by competitive tendering. The sale was intended to ‘improve the efficiency of airport investment and operations’, and was completed in three phases; the first in 1997 (Brisbane, Melbourne and Perth), the second in 1998 (Adelaide, Alice Springs, Canberra, Coolangatta, Darwin, Hobart, Launceston and Townsville) and the third in 2002 (Sydney). The move to privatisation was accompanied by:

---

Surveillance Authority was directed to hold an inquiry on the pricing of aeronautical and non-aeronautical activities by FAC: see Prices Surveillance Authority (1993).


Collins (1992).


The term of the airport leases were up to 50 years with an option to renew for 49 years: Airports Act 1996, s. 14(5)(c).

The 1995 Airports Bill introduced by the Labor Government had provided for the lease of FAC airports. However, the Bill lapsed on the dissolution of Parliament for the 1996 federal election.


Melbourne Tullamarine Airport (referred to as Melbourne airport in this paper).

Sydney (Kingsford-Smith) Airport (referred to as Sydney airport in this paper). The third phase also included Essendon Airport (2001) and Bankstown, Camden and Hoxton Park Airports (2003). The Hoxton Park lease expired in 2008 when the airport was closed (the freehold title was transferred to the owner of the lease).
• a transitional (five-year) CPI-X price cap regime in respect of ‘aeronautical services’ and monitoring of ‘aeronautical related services’ administered by the ACCC under the Prices Surveillance Act. The starting point for the CPI-X price cap was the former FAC prices. The ‘X’ values were set by the Government, based on recommendations by the ACCC. The price cap also made provision for new investment. Sydney airport was leased to a new government owned company on 1 July 1998 and was subject to a similar regime.

• accounting and reporting requirements on airport operators, and quality of service monitoring by the ACCC under the Airports Act.

• an access regime which resulted in certain airport services being deemed to be declared services for the purposes of Part IIIA of the TPA.

• limitations under the Airports Act on airline ownership and cross-ownership of certain airports.

In 2001, in response to suspension of Ansett’s operations and the September 11 terrorist attacks in the United States, the Government revised the price cap regime to allow price increases at the Phase I airports; replace price caps with price monitoring for Adelaide, Canberra and Darwin airports; and remove the remaining Phase II airports from the regime. In 2002, following a review by the Productivity Commission, the Government decided that a price cap regime would apply only to Sydney airport in respect of regional air services. Sydney, Brisbane, Melbourne, Perth, Adelaide, Canberra and Darwin airports would be subject to price monitoring for a five-year period, effective 1 July 2002.

---


280 Under s. 192 of the Airports Act 1996, as soon as practicable after the end of the designated period (12 months after the granting of the lease), the minister was required to issue a determination that certain services at the airport were declared services for the purposes of Part IIIA of the TPA (except to the extent that such services were the subject of an access undertaking under Part IIIA).

281 Subsequent policy was also influenced by the outbreak of SARS (severe acute respiratory syndrome) in 2002.

282 Alice Springs, Coolangatta, Hobart, Launceston and Townsville.


In 2007, following a further review by the Productivity Commission, the Government decided to continue price monitoring of aeronautical services at Sydney, Brisbane, Melbourne, Perth and Adelaide airports for a further six years, effective 1 July 2007. The price cap regime applying to regional services at Sydney airport would continue until 2010. The ACCC was also asked to monitor car parking prices at the major airports. In addition, the Government agreed to the Productivity Commission recommendation that the Minister for Transport and Regional Services should each year publicly indicate whether further scrutiny of airport conduct is necessary or ask airports to ‘show cause’ why their conduct should not be subject to a public inquiry under Part VIIA of TPA, or other inquiry. The Government stated:

an independent review will be carried out in 2012, or earlier if there is clear evidence of unjustifiable price increases or other misuse of market power across the price monitored airports. The Government reserves the right to re-impose price controls if airport operators are found to be misusing their market power by unjustifiably raising prices and/or imposing non-price conditions on access to aeronautical services and facilities in a manner inconsistent with the Government’s Aeronautical Pricing Principles.

5.2 Current regulation

The economic regulation of airports in Australia consists of the following components.

5.2.1 Prices surveillance

Aeronautical services provided by Sydney airport to airlines operating within New South Wales have been declared under Part VIIA of the TPA for the period 1 July 2007 to 1 July 2010. The ACCC is also required to monitor, and report on at the end of each financial year, the prices, costs and profits relating to the supply of aeronautical services and airport car parking services at Sydney, Brisbane, Melbourne, Perth and Adelaide airports.

The Aeronautical Pricing Principles, which specify the Government’s expectations on pricing behaviour for all airports, are similar to the pricing principles specified in Part IIIA of the TPA but also cover the negotiation process, the sharing of risks and...
returns, service-level outcomes, aeronautical asset revaluations, and peak period pricing.  

5.2.2 Access

Services provided by airport operators may be declared under the economy-wide access regime in Part IIIA of the TPA. As at 20 March 2009, one airport declaration (in respect of Sydney airport) was in force.  

5.2.3 Record keeping and information disclosure

The operators of Sydney, Brisbane, Melbourne, Perth and Adelaide airports are required to prepare audited accounts and give those accounts to the ACCC. The ACCC may publish those accounts.  

5.2.4 Quality of service monitoring

The ACCC is required to monitor and evaluate the quality of certain aspects of airport services and facilities at Sydney, Brisbane, Melbourne, Perth, Adelaide, Alice Springs, Canberra, Coolangatta, Darwin, Hobart, Launceston and Townsville airports. A person may be required to provide information to the ACCC for this purpose, and the ACCC may publish reports on its monitoring.  


In 2002, Virgin Blue applied to the NCC for declaration of the airside service at Sydney airport. In 2004, the minister accepted the NCC’s recommendation not to declare the service. In 2005, upon application for review by Virgin Blue, the service was declared by the Australian Competition Tribunal for a period of five years: Virgin Blue Airlines Pty Limited [2005] ACompT 5. The decision was upheld by the Full Court of the Federal Court: Sydney Airport Corporation Limited v Australian Competition Tribunal [2006] FCAFC 146. Leave to appeal was refused by the High Court: Sydney Airport Corporation Limited v Australian Competition Tribunal [2007] HCATrans 98 (2 March 2007). In January 2007, Virgin Blue notified the ACCC of an access dispute with Sydney Airport Corporation Limited. Following negotiated commercial settlement, the dispute was withdrawn in May 2007: Australian Competition and Consumer Commission, ACCC Welcomes Commercial Resolution of Access Dispute between Virgin Blue and Sydney Airport (Media release No. 130/07, 24 May 2007).


6. Electricity and gas

The supply chain for electricity involves generation, transmission (high-voltage lines), distribution (low-voltage lines in metropolitan and regional areas), and retailing (buying wholesale electricity and packaging it with transmission and distribution services for sale to residential, commercial and industrial customers). The supply chain for natural gas involves exploration and production, transmission (large diameter high-pressure pipelines that convey natural gas to a market), distribution (pipelines that reticulate natural gas within a market) and retailing. In contrast to electricity, natural gas can also be stored or converted to a liquefied form (LNG). This section describes the historical regulation of the electricity and gas industries in Australia, and the current regulation of electricity and gas transmission and distribution networks.

6.1 Background

By the 1950s the electricity industry in each State and Territory was dominated by a single vertically integrated State owned authority or a combination of State owned authorities. Apart from the Snowy Mountains Hydro-electric scheme, the industry did not operate on an interstate basis, and the Commonwealth had no involvement in its regulation.

Commercial use of natural gas commenced in Australia in 1969. Like electricity, natural gas was primarily regulated by the States although the Moomba-to-Sydney Pipeline was owned by the Commonwealth’s Pipeline Authority. In contrast to electricity, gas infrastructure was predominately owned by private enterprise and there was less vertical integration.

By the 1980s there was excessive electricity generation capacity in New South Wales in contrast to Victoria which required government funding for new generators. In 1990 a Special Premiers’ Conference agreed that there may be benefits from extending interconnection of the electricity networks covering New South Wales, Victoria, Queensland, South Australia, Tasmania and the Australian Capital Territory. Following a report by the Industry Commission, which found that there were significant shortcomings in the performance of the Australian electricity and gas industries, an intergovernmental advisory body (National Grid Management Council) was formed to develop a national market for the wholesale trading of electricity and retailing.
the Commonwealth announced a National Gas Strategy to remove barriers to the trade in natural gas. 303

In 1994, COAG, as part of a national agenda for microeconomic reform based on the Hilmer report, agreed to a broad set of principles for the gas and electricity industries, including 304:

- **Gas**: removing legislative barriers to free and fair trade in gas; implementing a uniform third party access regime for transmission and distribution pipelines; placing gas utilities on a commercial footing, through corporatisation; and separating transmission and distribution where the utility was publicly owned, and requiring ring fencing arrangements in privately owned utilities.

- **Electricity**: a national code of conduct covering network pricing, pool rules, operation and system control, and network connection and access.

These developments formed part of the 1995 competition policy reform agreements. 305

In 1996 New South Wales, Victoria, Queensland, South Australia and the Australian Capital Territory reached agreement on the enactment of legislation to apply a National Electricity Code. 306 The regulatory framework 307:

- Established and governed the operation of a national electricity market (NEM). The Code provided for all electricity output from generators to be centrally pooled and scheduled by the market administrator, the National

---

303 The Strategy envisaged freer interstate trade in natural gas with the Trade Practices Commission ensuring that monopoly power could not be used to restrict access to pipelines. The Strategy also followed the rejection by the Commonwealth Parliament in 1990 of the Pipeline Authority (Charges) Bill 1990, which was intended to be the first step in the implementation of the Australian Government’s decision to sell the Moomba-to-Sydney Pipeline. See Minister for Resources, the Hon. A.G. Griffiths (1991).


305 Under the Agreement to Implement the National Competition Policy and Related Reforms (11 April 1995), the Commonwealth agreed to provide financial payments to the States and Territories in return for them meeting certain obligations including the implementation of COAG agreements on electricity and gas reforms.


307 In 1996, South Australia enacted the lead legislation, *National Electricity (South Australia) Act*, which set out the National Electricity Law in a schedule. In 1997 New South Wales, Victoria, Queensland and the Australian Capital Territory enacted legislation that applied the NEL within their jurisdiction. Tasmania enacted the *Electricity—National Scheme (Tasmania) Act* in 1999. The NEL in turn provided for the ministers of each jurisdiction to approve the National Electricity Code and set out a regime for enforcement of the Code. In order to avoid the services being declared under Part IIIA of the TPA and to give the ACCC the power to perform the functions under the Code, it was decided that each owner or operator of a transmission and distribution network (network service providers) would have to provide a pro forma undertaking to the ACCC to be accepted under Part IIIA. This in turn required the Commonwealth, in 1997, to amend Part IIIA to provide for industry access codes: second reading speech on the Trade Practices Amendment (Industry Access Codes) Bill 1996: Australia, *Debates*, Senate, 27 June 1996, p. 2327 (Senator Kemp, Parliamentary Secretary to the Minister for Social Security). The ACCC had an additional role in authorising the Code under Part VII of the TPA.
Electricity Market Management Company (NEMMCO)\textsuperscript{308} to meet electricity demand, with the price paid by retailers and wholesale end-use customers to generators to be calculated by NEMMCO using the price offers and bids.

- Established the National Electricity Code Administrator (NECA)\textsuperscript{309} to enforce the Code in the National Electricity Tribunal and consider amendments to the Code.

- Set out technical standards.

- Underpinned the NEM with an open access regime for the use of the electricity networks which was intended to foster efficient investment and operating practices.\textsuperscript{310} The relevant regulator (the ACCC in relation to transmission lines, and the State regulators\textsuperscript{311} in relation to distribution lines) was required to set:
  \begin{itemize}
    \item for certain transmission services—the maximum revenue (revenue cap) that the network owner/operator could earn
    \item for certain distribution services—a revenue cap, weighted average price cap or a combination of the two\textsuperscript{312}
  \end{itemize}
  which in turn provided the basis for setting prices.\textsuperscript{313}

- Provided for the provision of information by, and the ring-fencing of, electricity transmission and distribution networks. (In addition to disaggregating businesses, Victoria and South Australia privatised their electricity supply industries).\textsuperscript{314}

\textsuperscript{308} National Electricity Market Management Company Ltd.
\textsuperscript{309} National Electricity Code Administrator Ltd.
\textsuperscript{310} National Electricity Code, clause 6.2.2.
\textsuperscript{311} Essential Services Commission (Vic); Essential Services Commission of South Australia (SA); Independent Competition and Regulatory Commission (ACT); Independent Pricing and Regulatory Tribunal (NSW); Office of the Tasmanian Energy Regulator (Tas); and the Queensland Competition Authority (Qld).
\textsuperscript{312} In addition, some jurisdictional regulators imposed local regulatory frameworks as a condition of licensing arrangements for distribution businesses.
\textsuperscript{313} National Electricity Code, chapter 6.
In 1997 the Commonwealth and all State and Territory governments reached agreement on the enactment of legislation to apply a National Third Party Access Code for Natural Gas Pipeline Systems.\(^{315}\) The regulatory framework:\(^{316}\)

- Established the National Gas Pipelines Advisory Committee (NGPAC) (to make recommendations to ministers on amendments to the regime) and a Code Registrar.\(^{317}\)

- Required the owners or operators of certain pipelines\(^{318}\) to lodge an access arrangement with the relevant regulator for approval (the ACCC for transmission pipelines\(^{319}\) and the State regulators for distribution pipelines\(^{320}\)). The access arrangement would set out the terms and conditions of access (including the tariffs at which the transmission/distribution services would be sold to gas producers, retailers and users).

- Provided for the provision of information by, and the ring-fencing of, gas transmission and distribution networks. (In addition, a number of States privatised their gas industries).\(^{321}\)

The criteria against which a proposed access arrangement must be assessed were set out in the Code. If the relevant regulator did not approve the proposed access arrangement, the regulator was required to draft and approve its own access arrangement to apply to the service provider. An access arrangement was not enforceable. However, in the event of an access dispute, the terms and conditions of access to a service covered by

---

\(^{315}\) Natural Gas Pipelines Access Agreement (7 November 1997).

\(^{316}\) In 1997, South Australia enacted the lead legislation (Gas Pipelines Access (South Australia) Act 1997). Schedules 1 and 2 of that Act set out the Gas Pipelines Access Law (including the National Third Party Access Code for Natural Gas Pipeline Systems) (GPAL). In 1998 the Commonwealth, New South Wales, Victoria, Queensland, Australian Capital Territory and Northern Territory enacted legislation that applied the GPAL within their jurisdictions. Western Australia agreed to enact legislation that essentially had an identical effect to the GPAL: Gas Pipeline Access (Western Australia) Act 1998 (WA). Tasmania agreed to enact legislation before the first natural gas pipeline was approved or any competitive tendering process for a new natural gas pipeline in Tasmania had commenced: Natural Gas Pipelines Access Agreement (7 November 1997) cl 4.3; Gas Pipelines Access (Tasmania) Act 2000 (Tas). To avoid the services being declared under Part IIIA of the TPA, each State and Territory agreed to seek certification under Part IIIA. All State and Territory gas access regimes, other than Queensland’s (which contained Queensland-specific derogations), were certified as effective.

\(^{317}\) Natural Gas Pipelines Access Agreement (7 November 1997), clause 9.

\(^{318}\) The means by which a pipeline may become covered were set out in chapter 1 of the Code. In summary, Schedule 1 of the Code deemed certain pipelines to be covered pipelines at the commencement of the Code. Any person could apply to the NCC for coverage of an additional pipeline or revocation of coverage. The decision was made by the relevant minister after receiving the NCC’s recommendation.

\(^{319}\) Except Western Australia.

\(^{320}\) Except the Northern Territory where the ACCC was the regulator.

the Code were determined by the relevant arbitrator. An arbitration determination had to be consistent with the relevant access arrangement.

In contrast to electricity, the national gas regime did not address technical matters such as market operational rules. Gas transmission systems are generally operated as a contract carriage model, where shippers contract for specific capacity over specific pipelines between points of injection and delivery. An exception is the Victorian system which, in part, is operated as a market carriage model. Under this model, an independent statutory authority (VENCorp) operates a spot market for managing system imbalances and constraints, and transmission charges are based on usage.

In 2001, following energy price increases, COAG established the Ministerial Council on Energy (MCE) and an independent panel chaired by Warwick Parer to review energy market reform in Australia. In addition, in 2001, the NEM Forum of Ministers was established to provide a framework for settling matters of policy affecting the development of the NEM. The Parer review reported in 2002, and the MCE reported to COAG in 2003. A review of the gas access regime was also completed by the Productivity Commission in 2004. The series of reports identified the need to create a consistent and seamless approach to regulation across the energy sector, and to improve certainty and minimise the costs of regulation for investors.

In response, in 2004, Australian governments agreed to the following governance reforms:

- COAG would be responsible for making broad in-principle decisions on national energy policy. The MCE would provide advice to COAG on energy market policy (superseding the NEM Ministers Forum).

- The Australian Energy Market Commission (AEMC) would be established with responsibility for rule-making and energy market development (in place of NECA, NGPAC and the Code Registrar).

- The AER would be responsible for market regulation (the functions previously exercised by NECA, the ACCC and State/Territory regulators).

---

322 The MCE comprises Commonwealth, State and Territory energy ministers. Ministers from New Zealand and Papua New Guinea have observer status.
324 New South Wales, Victoria, Queensland, South Australia and the Australian Capital Territory were members of the Forum. Tasmania and the Commonwealth participated in the Forum as observers.
328 Australian Energy Market Agreement (30 June 2004) between the Commonwealth, New South Wales, Victoria, Queensland, Western Australia, South Australia, Tasmania, Northern Territory and Australian Capital Territory.
329 The AEMC and AER were established by Commonwealth legislation: *Australian Energy Market Commission Establishment Act 2004; Trade Practices Amendment (Australian Energy Market) Act*
(The AER is a separate statutory authority from the ACCC but is administratively part of the ACCC. The ACCC retains the role of competition regulator under Part IV of the TPA).

The changes to the electricity regime were reflected in a new National Electricity Law (NEL) and the National Electricity Rules (NER) which replaced the National Electricity Code. The AER commenced operation on 1 July 2005, with initial responsibility for enforcing the NER and the economic regulation of electricity transmission networks.

In June 2006 the Australian Energy Market Agreement was amended to establish a nationally consistent framework for electricity and gas energy access. This followed a report to the MCE on energy access pricing and the MCE’s response to the Productivity Commission’s gas review. The response included a policy decision to amend the gas regime to introduce a ‘light handed regulatory option’ (monitoring and dispute resolution) as an alternative to the regulator undertaking an up-front, periodic assessment of tariffs.

---

330 The legislation provides for the conferral by State/Territory law of functions and powers on the Commonwealth statutory authorities.

In particular, the full time member of the AER is also a full time Commissioner of the ACCC. The AER Chair and the part time member are associate Commissioners of the ACCC by virtue of their appointment to the AER. In addition, a single body of staff provides assistance to both the AER and the ACCC.

331 The National Electricity (South Australia) (New National Electricity Law) Amendment Act 2005 (SA) substituted the schedule to the National Electricity (South Australia) Act 1996 (SA) setting out the National Electricity Law. The new NEL provides for the National Electricity Rules. The Commonwealth is also a participating jurisdiction through the application of the regime to the offshore area: Australian Energy Market Act 2004 (Cwlth).

332 It was originally agreed that, except for Western Australia, the AER was to be responsible for the economic regulation of gas transmission networks (by 30 June 2005), and electricity and gas distribution networks and retail markets (other than retail pricing) (by 31 December 2006): clause 9.1.

333 Notice of Amendment to the Australian Energy Market Agreement (2 June 2006). The amendments also included an agreement to seek certification under Part IIIA of the TPA of the gas and electricity access regimes, and specific reforms to the electricity and gas distribution and retail frameworks.

334 Expert Panel on Energy Access Pricing (2006). The Panel was appointed in December 2005, as part of the MCE’s response to the PC’s review of the gas regime, to provide advice on a model to achieve a common approach to transmission and distribution revenue and network pricing across electricity and gas.

The NEL was amended, with effect on 1 January 2008, to, among other things:\footnote{336}

- introduce a new set of electricity revenue and pricing principles, including the transfer of economic regulation of electricity distribution networks to the AER.
- introduce merits review of certain AER decisions by the Australian Competition Tribunal.
- implement a new access disputes framework.

The amendments are intended to ‘strengthen and improve the quality, timeliness and national character of the economic regulation of the National Electricity Market’.\footnote{337}

The framework was intended to be replicated in a new National Gas Law (and National Gas Rules, NGR) set out in a schedule to the \textit{National Gas (South Australia) Act 2008} (SA), which commenced on 1 July 2008.\footnote{338} Among other things, the NGL transferred gas transmission and distribution regulation to the AER (except in Western Australia, where certain pipelines will continue to be regulated by the Economic Regulation Authority), and established the Natural Gas Services Bulletin Board to provide information on Australia’s gas markets.

Subject to jurisdictional agreement, separate legislation is also proposed to establish a national framework for the transfer of electricity and gas regulation of distribution (non-economic) and retail (non-price) functions to the AER and AEMC.\footnote{339} In addition, COAG has agreed to establish the Australian Energy Market Operator (AEMO) for both electricity and gas, encompassing a new national transmission planning function.\footnote{340}

\footnote{336} \textit{National Electricity (South Australia) (National Electricity Law—Miscellaneous Amendments) Amendment Act 2007} (SA). In addition, the \textit{Australian Energy Market Commission Establishment (Consumer Advocacy Panel) Amendment Act 2007} (SA) amended the \textit{Australian Energy Market Commission Establishment Act 2004} (SA) to establish the Consumer Advocacy Panel (as a constituent, but independent, part of the AEMC) to facilitate consumer engagement with the gas and electricity industries, in place of clause 8.10 of the NER. The amendments came into operation at the same time as the National Gas Law (1 July 2008).


\footnote{338} The NGL is implemented in all jurisdictions: \textit{Australian Energy Market Act 2004} (Cwlth); \textit{National Gas (ACT) Act 2008} (ACT); \textit{National Gas (New South Wales) Act 2008} (NSW); \textit{National Gas (Northern Territory) Act 2008} (NT); \textit{National Gas (Queensland) Act 2008} (Qld); \textit{National Gas (Tasmania) Act 2008} (Tas); and \textit{National Gas (Victoria) Act 2008} (Vic). As at 20 March 2009, the National Gas (WA) Bill 2008 had not been passed.

\footnote{339} The legislation is expected to be introduced to the South Australian Parliament by no later than 30 September 2009: Ministerial Council on Energy, \textit{Communique} (Perth, 13 December 2007). Retail energy price control will continue under the existing arrangements, but each jurisdiction has the discretion to transfer this function to the AER and the AEMC.

\footnote{340} Council of Australian Governments, \textit{Communique}, Canberra, 13 April 2007. The Agreement was in response to the report of the Energy Reform Implementation Group (chaired by Mr Bill Scales AO)
6.2 Current regulation

6.2.1 Electricity transmission and distribution

The objective of the NEL (‘national electricity objective’) is to:

- promote efficient investment in, and efficient operation and use of, electricity services for the long term interests of consumers of electricity with respect to—
  - (a) price, quality, safety, reliability and security of supply of electricity; and
  - (b) the reliability, safety and security of the national electricity system.

In respect of transmission services, the NER defines two categories of regulated services: prescribed transmission services and negotiated transmission services.

Chapter 6A of the NER requires (subject to the NER) a transmission network service provider (TNSP) to provide these services, upon application by certain persons, on terms and conditions that are consistent with the requirements of the NER. Access disputes in respect of the services continue to be subject to Chapter 6A of the NER (rather than Part 10 of the NEL). Chapter 6A provides for the arbitration of access disputes by a ‘commercial arbitrator’ appointed by the AER. However, the service provider is also subject to:

- a transmission determination made by the AER that includes a revenue determination in respect of prescribed transmission services and specifies a negotiating framework and negotiated transmission service criteria to apply to the negotiation of terms and conditions of access to negotiated transmission services.
- detailed provisions governing connection applications, and the terms and conditions of connection.
- a requirement, subject to certain exceptions, not to act as an electricity generator, distributor or retailer.


341 NEL, s. 7.
342 NER, Chapter 10.
343 NER, clause 6A.1.3.
344 NER, Chapter 6A Part K.
345 NER, clause 6A.2.2. The revenue determination determines the maximum revenue that the TNSP may earn in a regulatory year, which in turn provides the basis for deriving charges. In summary, Chapter 6A sets out a building block model for deriving the annual revenue requirement.
346 NER, clause 6A.9.
347 NER, Chapters 4, 5 and 6A.
In respect of distribution, the NER provides for the AER to classify a distribution service as a: direct control service (which in turn is divided into two subclasses: standard control services and alternative control services); or a negotiated distribution service.\(^{349}\) (If the AER decides not to classify a distribution service, the service is not regulated under the NER).

Chapter 6 of the NER requires (subject to the NER) a distribution network service provider (DNSP) to provide these services, upon application by a ‘Service Applicant’, on the terms and conditions as determined under the NER.\(^{350}\) Certain access disputes in respect of the services are subject to the dispute regime in Part 10 of the NEL.\(^{351}\) Under Part 10, if a user or prospective user is unable to agree with a service provider about access to certain services, either party may notify the AER of the dispute, and the AER must (subject to certain exceptions) make a determination that binds the parties.\(^{352}\)

However, the service provider is also subject to:

- a distribution determination made by the AER that controls the price of, and/or revenue derived from, a direct control service\(^ {353}\), and specifies a negotiating framework and negotiated distribution service criteria to apply to the negotiation of terms and conditions of access to negotiated distribution services.\(^ {354}\)

- detailed provisions governing connection applications, and the terms and conditions of connection.\(^ {355}\)

- guidelines, which may be developed by the AER, for the accounting and functional separation of the provision of ‘direct control services’ from other services.\(^ {356}\)

\(^{349}\) NER, clauses 6.2.1 and 6.2.2.
\(^{350}\) NER, clause 6.1.3.
\(^{351}\) NER, clause 6.22.1.
\(^{352}\) A determination must give effect to any applicable ‘network revenue or pricing determination’: NEL, s. 130.
\(^{353}\) NER, clause 6.2.5. For a standard control service, the control mechanism must be of the prospective CPI-X form, or some incentive-based variant of the prospective CPI-X form, in accordance with Chapter 6 Part C of the NER (which, in summary, sets out a building block model). The control mechanism for an alternative control service may, but need not, utilise the elements of Part C: NER, clause 6.2.6. Chapter 6 of the NER is intended to provide a ‘fit for purpose’ framework for the assessment by the AER of an element of a service provider’s regulatory proposal (that is, the NER determines the level of discretion the AER has in dealing with the different aspects of a regulatory determination): see second reading explanation to the National Electricity (South Australia) (National Electricity Law – Miscellaneous Amendments) Amendments Bill 2007: South Australia, Hansard, House of Assembly, 27 September 2007, p. 963 at p. 965 (The Hon. P.F. Conlon, Minister for Energy).
\(^{354}\) NER, clause 6.7.
\(^{355}\) NER, Chapters 4, 5, 6 and 7.
\(^{356}\) NER, clause 6.17.
6.2.2 Gas transmission and distribution

The objective of the NGL is to:\(^{357}\):

promote efficient investment in, and efficient operation and use of, natural gas services for the long term interests of consumers of natural gas with respect to price, quality, safety, reliability and security of supply of natural gas.

Under the regime, any person may apply to the NCC for a recommendation that a pipeline be covered. On receiving the NCC’s recommendation, the relevant minister may cover the pipeline. At the time of making the recommendation, the NCC must also decide whether the pipeline services are light regulation services.\(^{358}\)

If the pipeline is covered, service providers of fully regulated pipelines will, in general, be required to submit an access arrangement to the AER for approval. The access arrangement sets out the terms and conditions of access (including price and/or revenue), which the AER must apply when arbitrating an access dispute.

Light regulation service providers will be required to publish the terms and conditions of access (including price) on their websites, but may also voluntarily submit a ‘limited access arrangement’ to the AER for approval.

The regime also governs ring-fencing and information provision.

---

\(^{357}\) NGL, s. 23.

\(^{358}\) There is no requirement for service providers of light regulation pipelines to submit an access arrangement.
7. Rail

Rail transport can be categorised as passenger (urban and non-urban) and freight (ores and minerals, seasonal (grain), and non-bulk). Rail infrastructure is broadly divided into below-rail (track), above-rail (trains—locomotives, wagons and carriages) and ancillary (terminals). This section describes the historical regulation of the rail industry in Australia, and the current regulation of below-rail infrastructure services.

7.1 Background

Railway construction by private companies began in Australia during the 1850s but was later taken over by individual colonial governments. The initial purpose of rail development was to connect the hinterland with major export seaports. By Federation in 1901, all States except Western Australia were linked by rail, although by three different gauges. New South Wales used the European standard gauge; Victoria and South Australia used the broad Irish gauge; and Tasmania, Queensland, Western Australia and parts of South Australia used the narrow gauge.

In 1911 the Commonwealth Parliament authorised the construction, by a new Railway Construction Department, of the Trans-Australian Railway connecting Western Australia to South Australia. In 1917 an Act was passed by which all the Commonwealth railways (including the railways in the Northern Territory and Australian Capital Territory) were vested in a Commissioner. However, until the 1970s, the Commonwealth’s role was mainly limited to providing funding to the States for the development of an inter-capital standard gauge network.

The move towards a national system of rail was revived in the 1970s when the Commonwealth Labor Government proposed to take over State owned non-metropolitan rail operations, and create one national rail operator (Australian National Railways Commission, AN). However, only South Australia and Tasmania agreed to the transfer.

---

359 Kalgoorlie to Port Augusta Railway Act 1911.
360 Commonwealth Railways Act 1917.
361 Australian National Railways Act 1975. The States were offered financial compensation.
362 Only two States (South Australia and Tasmania) had Labor administrations at the time.
In 1983, AN was placed on a more commercial footing. In the second reading speech, the Minister for Transport referred to the impact of the economic downturn and drought on AN’s financial performance and stated:

The Bill now before us will provide the framework under which AN can function as a commercially oriented transport authority. … An important feature of this Bill is that the powers of the Commission have been comprehensively defined. Ministerial intervention in day to day activities is minimised while ministerial oversight is retained in critical areas. This ensures that the Commission is provided with that necessary flexibility to operate commercially but remains properly accountable to the Parliament.

In 1986 the Government commenced community service obligation payments to AN. In 1989, as part of the Australian Government’s GBE reform program, AN was given further commercial autonomy.

In response to rail budget deficits and concerns about the efficiency of intercity rail freight operations, Australian governments agreed in 1991 to establish the National Rail Corporation to provide an interstate rail freight carriage service. AN’s interstate freight operation was transferred to National Rail, although AN retained the Commonwealth’s below-rail infrastructure (the lines between Melbourne and Adelaide, Adelaide and Kalgoorlie, Adelaide and Broken Hill and Adelaide and Alice Springs).

In 1995 the interstate standard gauge rail network was completed, and an interim access pricing regime for AN’s interstate rail network was established to allow private firms to compete with National Rail.

Following the National Rail Summit in September 1997, the Commonwealth, State and Territory transport ministers agreed to form a national track authority (the Australian Rail Track Corporation (ARTC)) to provide access to the interstate standard gauge rail network.

---


366 See footnote 178.

367 See the background to the inquiry set out in *Industry Commission (1991).*

368 Agreement about the Establishment of National Rail Corporation Ltd (30 July 1991) between the Commonwealth, New South Wales, Victoria, Queensland and Western Australia, set out in the schedule to *National Rail Corporation Agreement Act 1992*.

369 AN also retained the Commonwealth’s remaining above-rail operations, including the Indian-Pacific, the Ghan, The Overland passenger services, Tasrail, SA Freight and the Seat of Government Railway.

370 A separate business unit known as AN Track Access was set up within AN to administer access to the interstate track under AN control. The first private rail operator to gain access to a part of the interstate network, was Specialised Container Transport, which started a Melbourne to Perth freight service in 1995. To achieve this, SCT had to have access agreements in place with AN Track Access, the Public Transport Commission (Victoria) and Westrail: ARTC History, at www.artc.com.au/Content.aspx?p=32 (accessed 1 November 2007).
network.\textsuperscript{371} AN’s interstate standard gauge track and lease of the Victorian interstate standard gauge were acquired by ARTC.\textsuperscript{372} In 2002, the ACCC accepted an undertaking under Part IIIA of the TPA given by ARTC in respect of its interstate track in Victoria and South Australia.\textsuperscript{373}

While ARTC was intended to provide a ‘one-stop shop’ for access, interstate rail operators continued to be subject to multiple State regimes. In 2006 COAG agreed, as part of the new National Competition Policy reform agenda, to\textsuperscript{374}:

- Implement a ‘simpler and consistent national system of rail access regulation’ using the ARTC access undertaking as a model, to apply to certain nationally significant railways.\textsuperscript{375}

- Ask the Productivity Commission to develop proposals for efficient pricing of road and rail freight infrastructure.

- Implement a nationally-consistent rail safety regulatory framework.

Following the Productivity Commission’s report\textsuperscript{376}, COAG agreed on 13 April 2007 to a series of timelines to meet the COAG commitments, including a target of December 2008 to implement a national system of rail access regulation.\textsuperscript{377}

### 7.2 Current regulation

#### 7.2.1 Intrastate rail access

Access to intrastate rail networks is governed by State and Territory regimes. In particular:

- New South Wales: NSW Rail Access Undertaking established pursuant to the \textit{Transport Administration Act 1988}.

---

\textsuperscript{371} Australian Rail Track Corporation Agreement (14 November 1997) between the Commonwealth, New South Wales, Victoria, Queensland, Western Australia and South Australia. Australian Rail Track Corporation Ltd (ARTC) is a company under the \textit{Corporations Act 2001} whose shares are owned by the Commonwealth.

\textsuperscript{372} AN’s remaining assets were privatised in 1997: \textit{Australian National Railways Commission Sale Act 1997}. The sale followed a review of AN in 1996: Brew (1996). In 2003, National Rail was sold to the National Rail Consortium Pty Ltd which was jointly owned by Toll Holdings Limited and Lang Corporation Limited. The consortium also acquired FreightCorp which was owned by the NSW Government.

\textsuperscript{373} The 2002 access undertaking related to those parts of the ARTC Interstate Rail Network linking Kalgoorlie (WA), Tarcoola (SA), Broken Hill (NSW), Melbourne (Vic) and Wodonga (Vic). The undertaking was for a five year period to 1 June 2007.

\textsuperscript{374} Council of Australian Governments, \textit{Communique}, Canberra, 10 February 2006, Attachment B, Appendix B, C and E.

\textsuperscript{375} Competition and Infrastructure Reform Agreement (10 February 2006).

\textsuperscript{376} Productivity Commission (2006B).

• Queensland: Queensland Rail’s access undertaking, approved by the Queensland Competition Authority in 2006 under the Queensland Competition Authority Act 1997.

• South Australia: Railways (Operations and Access) Act 1997.


Access is also subject to Part IIIA of the TPA. As at 16 February 2009, two rail networks have been declared (in respect of the Tasmanian networks, and networks in the Pilbara, Western Australia, although the latter declarations are currently before the Australian Competition Tribunal).

7.2.2 Interstate rail access

In 2008 the ACCC accepted an undertaking under Part IIIA of the TPA given by ARTC in respect of its interstate rail network (the mainline standard gauge in Victoria, South Australia and New South Wales).379 In April 2009 ARTC lodged a separate access undertaking for the Hunter Valley coal rail network.


379 ARTC commenced a 60-year lease, in 2004, of certain parts of the New South Wales rail network (including the interstate NSW rail network outside of the Sydney metropolitan commuter network, and the Hunter valley coal rail network). The 2008 interstate access undertaking replaces the 2002 undertaking but also includes the NSW interstate rail network.
8. Ports and shipping

Sea transport involves a chain of services where goods are moved from a primary producer or manufacturer to the port, loaded onto a ship, transported to a destination port, unloaded and delivered to a final customer. A port operator provides services to a specific port or group of ports—it controls the use of the waters and lands within port boundaries; provides safe access and harbouring for ships; and plans, provides and allocates port infrastructure (such as channels, breakwaters, navigation aids and berths).

Broadly, there are four categories of cargo: bulk (e.g. coal, iron ore and grain); liquid bulk (e.g. oil); containerised non-bulk; and general (non-containerised) non-bulk. A liner service is a fleet of ships, with a common ownership or management, which provides carriage for cargo, in regularly scheduled services, between specified ports. Liners typically transport goods in containers (in contrast to bulk shipping operations which use purpose-built vessels to carry homogeneous products).

Stevedoring refers to the step of loading/unloading cargo, storing the cargo and in most cases transferring the cargo to and from land transport. Container terminals consist of a yard in which to stack containers, handling equipment to transport and stack containers, and shore-based cranes to lift the containers on and off ships.

Harbour tugs assist ships to manoeuvre in navigation channels and to enter and leave berths at ports. Harbour towage requirements are largely determined by the characteristics of each port, and the size and number of ships.

This section describes the historical regulation of ports and shipping in Australia, and the current regulation of these services.

8.1 Background

Since the First Fleet arrived in Port Jackson (Sydney) in 1788, ports and shipping have been a central part of Australia’s history—every Australian capital, except for Canberra, began as a natural port.

---

386 Lee (2003, Chapter 2).
8.1.1 Ports

In Australia, the States and Territories have principal responsibility for the establishment and regulation of ports. Australia’s major ports were primarily controlled historically by public authorities, although privately owned ports were also developed under State arrangements (usually as an adjunct to a large industrial enterprise such as an iron ore company). 387

In the 1990s, State and Territory Governments initiated reforms to port authorities within the framework of the National Competition Policy. The reforms included corporatisation and, in some cases, privatisation (in Victoria and South Australia). The State and Territory regimes include (as at 20 March 2009):

- New South Wales: The *Ports and Maritime Administration Act 1995* established three state-owned port corporations (Sydney Ports Corporation (Port Jackson/Port Botany), Port Kembla Port Corporation and Newcastle Port Corporation). The Act sets out a pricing regime that, in summary, allows the minister to set charges. The Act also establishes a government body, the Maritime Authority of NSW, to regulate the port corporations.

- Northern Territory: The *Darwin Port Corporation Act* established the state-owned Darwin Port Corporation.

- Queensland: State-owned port authorities are created under the *Transport Infrastructure Act 1994* and *Government Owned Corporations Act 1993*. The ports of Mackay, Townsville and Cairns are managed by individual regional port authorities. The ports of Gladstone and Rockhampton, and the ports of Brisbane and Bundaberg, are managed by single port authorities, Gladstone Ports Authority and Port of Brisbane Corporation Ltd. 388 The Ports Corporation of Queensland is responsible for thirteen ports. The Queensland Competition Authority regulates prices and access, under the *Queensland Competition Authority Act 1997*, to certain port terminals. In 2006 the Authority approved an access undertaking in respect of the coal handling services at Dalrymple Bay (leased by the Queensland Government to a private business, Babcock and Brown Infrastructure). 389

- South Australia: The state-owned South Australian Ports Corporation was replaced by a privately owned company (Flinders Ports Pty Ltd) to operate seven ports across South Australia (Port Adelaide, Port Lincoln, Port Pirie, Klein Point, Port Giles, Thevenard and Wallaroo). 390 The Essential Services Commission of South Australia is responsible for price and access regulation in respect of ports under the *Maritime Services (Access) Act 2000* and *Essential Services Commission Act 2002*.

---

387 Industry Commission (1993, pp. 6–8).
390 *South Australian Ports (Disposal of Maritime Assets) Act 2000* (SA).
• Tasmania: Under the *Tasmanian Ports Corporation Act 2005*, a state-owned company (Tasmanian Ports Corporation Pty Ltd) operates all ports in Tasmania.

• Victoria: The *Port Services Act 1995* establishes two state-owned port corporations (Port of Melbourne Corporation and Port of Hastings Corporation).\(^ {391}\) The Port of Geelong and Port of Portland were privatised in 1996 (Geelong Port and Port of Portland Pty Ltd).\(^ {392}\) Certain port services are subject to price regulation by the Victorian Essential Services Commission under the *Essential Services Commission Act 2001* and may be subject to access regulation under the *Port Services Act 1995*.\(^ {393}\)

• Western Australia: The *Port Authorities Act 1999* establishes eight state-owned port authorities (Albany, Broome, Bunbury, Dampier, Esperance, Fremantle, Geraldton and Port Hedland). There are also eight non-port authority ports in Western Australia that contain privately operated export facilities. These facilities operate under an agreement with the Western Australian Department for Planning and Infrastructure, which retains ownership of each port on behalf of the Government.\(^ {394}\)

The trend has been for port authorities to adopt the ‘landlord’ model of operation, under which they undertake only core activities with contestable waterfront services (such as stevedoring) supplied by private companies.\(^ {395}\) In general, Australia’s port authorities are not responsible for land transport links into and out of the ports.\(^ {396}\)

In 2006 all Australian governments agreed to a set of principles for port competition and regulation.\(^ {397}\) This included a commitment to review the regulation of ports and port authority, handling and storage facility operations at significant ports by the end of 2007, with the findings of the reviews to be implemented by each jurisdiction by the end of 2008.\(^ {398}\)

\(^{391}\) The Corporation administers the Port Management Agreement (Port of Hastings) through which daily operation of the port is undertaken by Patrick Ports Hastings (formerly Toll Holdings), a division of Asciano Ltd. The Port of Hastings has been leased and managed by Toll/Patrick since 1997.


\(^{393}\) See Essential Services Commission, Victoria (2009B).

\(^{394}\) See Western Australia (2006).


\(^{396}\) See Infrastructure Australia (2008A, p. 23).

\(^{397}\) Competition and Infrastructure Reform Agreement (10 February 2006), clause 4.

8.1.2 Container stevedoring

In the 1960s the introduction of containerisation in Australia resulted in a major reduction in the number of waterside workers. However, a 1977 inquiry by the Prices Justification Tribunal referred to both the cost of wages and excessive profits and recommended that container handling charges be reduced.399

In 1989, following an inquiry by the Inter-State Commission400, the Australian Government announced a three-year program (concluding in 1992) to reform the stevedoring industry.401 The reforms were implemented under the terms of an In-Principle Agreement negotiated between the Australian Council of Trade Unions, stevedoring employers, stevedoring unions and the Government (under the auspices of the Waterfront Industry Reform Authority). The Agreement involved a move from industry-based to company employment under enterprise bargaining agreements, in return for the Government contributing to the costs of redundancy and training.

From March 1991 to November 1995, stevedoring prices and costs were monitored by the Prices Surveillance Authority to evaluate the extent to which implementation of enterprise bargaining agreements had led to lower stevedoring charges.402

The Workplace Relations Act enacted in 1996 was also intended to provide a framework for achieving increased competition and greater labour flexibility and productivity. Key aspects included moving to negotiation of employment agreements at the enterprise level, voluntary unionism, restricting the right to strike and reinstating the TPA secondary boycott provisions.403

In 1998, at the time of a Productivity Commission study404 and an industrial dispute between Patrick Stevedores and the Maritime Union of Australia405, the Australian Government announced a further reform package to improve the efficiency of the industry.406 The package included:

---

399 Prices Justification Tribunal (1977A); Prices Justification Tribunal (1977B).
400 Inter-State Commission (1989). The Inter-State Commission was created by s. 101 of the Australian Constitution.
401 Willis (1989).
403 Second reading speech on the Workplace Relations and Other Legislation Amendment Bill 1996: Australia, Debates, House of Representatives, 23 May 1996, pp. 1295-1305 at p. 1296 (Mr Reith, Minister for Industrial Relations); Minister for Transport and Regional Development, the Hon. John Sharp MP, Why Not 'Simply the Best'? (Speech at the AIC Waterfront Reform Conference, Sydney, 2 September 1996).
404 The reports were released on 28 April 1998: Productivity Commission (1998A) and (1998B).
405 The reforms followed the termination by Patrick Operations Pty Ltd of labour supply agreements with four Patrick labour hire companies that employed members of the Maritime Union of Australia.
• An agreement by the Government to lend funds to stevedoring operators, through the Maritime Industry Finance Company (MIFCo), to enable them to restructure their workforces by offering voluntary redundancies. The loans were recovered by a levy (which came into effect on 1 February 1999) payable by Australian stevedores. Patrick Terminals and P&O Ports committed to absorb the cost of the levy within their existing charging.\(^{407}\)

• A direction by the Federal Treasurer (on 20 January 1999) to the ACCC under the Prices Surveillance Act to monitor prices, costs and profits of container terminal operator companies at certain ports.\(^{408}\) The monitoring was intended to provide information about the progress being made in waterfront reform, and to ensure that the stevedoring levy was absorbed by the industry and not passed on to consumers.\(^{409}\)

On 26 May 2006 the Federal Minister for Transport and Regional Services announced that the stevedoring levy was to cease at the end of that month.\(^{410}\)

### 8.1.3 Harbour towage

As part of the broader reforms to the shipping industry in the late 1980s, the Commonwealth formed a Towage Industry Reform Committee which developed a Towage Industry Reform strategy in 1989. The Strategy covered issues such as maximum crew size, training courses for crews to allow for smaller crew sizes, and voluntary early retirement and compulsory redundancy schemes (jointly funded by the Commonwealth and towage industry employers).\(^{411}\)

As part of this process\(^{412}\), the Prices Surveillance Authority was asked in 1990 to undertake an inquiry into harbour towage charges, including whether the benefits arising from reforms were reflected in charges for harbour towage services.\(^{413}\) This led, in 1991, to the declaration under the Prices Surveillance Act of harbour towage services at the ports of Melbourne, Sydney (Port Botany and Port Jackson), Newcastle, Brisbane, Fremantle and Adelaide.\(^{414}\)

---

\(^{407}\) See Treasurer, the Hon. Peter Costello, MP, *Prices Monitoring of Container Stevedoring Services* (Media release, 22 January 1999).

\(^{408}\) Direction No. 17 under the *Prices Surveillance Act 1983* (20 January 1999).

\(^{409}\) Treasurer, the Hon. Peter Costello, MP, *Prices Monitoring of Container Stevedoring Services* (Media release, 22 January 1999).

\(^{410}\) Minister for Transport and Regional Services, the Hon. Warren Truss MP, *Stevedoring Levy Ends This Month* (Media release, 26 May 2006).

\(^{411}\) See Towage Industry Reform Implementation Committee (1992).

\(^{412}\) See Minister for Transport and Communications, Mr Willis, *Ministerial Statement: Reform of Shipping and the Waterfront* (Senate Hansard, 7 June 1989).

\(^{413}\) Prices Surveillance Authority (1990B).

The declarations were extended to 2002\textsuperscript{415} when a review by the Productivity Commission recommended that the declarations of harbour towage services not be renewed upon expiry.\textsuperscript{416} This recommendation was accepted by the Government in 2003. Since this time, harbour towage prices at the nominated ports have been surveyed by the Bureau of Transport and Regional Economics (this process is described by the Government as light-handed monitoring).\textsuperscript{417}

8.1.4 Wheat export ports

Since 1845 wheat has been one of Australia’s main sources of export income.\textsuperscript{418} Production rapidly expanded following the construction of inland railways in the 1920s and bulk-handling facilities to hold grain in the 1930s and 1940s.

The Australian Wheat Board (AWB) was established in 1939 as a statutory authority with a monopoly over the marketing (both domestic and export) of Australian wheat (the ‘single-desk’).\textsuperscript{419} Until the 1970s the AWB maintained a price stabilisation (buffer) fund supported by government subsidies if industry funds were exhausted.

Regulation of the sale of wheat to the domestic market was removed in 1989.\textsuperscript{420} In 1999 the AWB was converted to a private company (AWB Ltd) owned by wheatgrowers. Australian export continued to be directed through a single exporter of bulk wheat, Australian Wheat Board International Ltd (a subsidiary of AWB Ltd).\textsuperscript{421}

On 1 July 2008 the export single desk was replaced by a Wheat Export Accreditation Scheme under the Wheat Export Marketing Act 2008. In summary, exporters who want to export bulk wheat from Australia must be accredited by Wheat Exports Australia (WEA), a government statutory authority.

The export of Australian wheat relies upon a transportation chain including storage and handling. Country receiveal and storage facilities are connected by rail or road to seaboard export terminals. Bulk wheat is usually stored temporarily within the terminals. One of the concerns with the 2008 reforms was that port infrastructure

\begin{itemize}
  \item \textsuperscript{415} Following a 1995 ACCC inquiry (which recommended that declaration be replaced by monitoring), the Commonwealth introduced a three-year sunset clause on the declarations in 1996. In 1999, the declarations were continued for a further three years. See Australian Competition and Consumer Commission (1995).
  \item \textsuperscript{416} Productivity Commission (2002A). The Productivity Commission’s report referred to the role of contracting and licensing by towage users and port authorities, and recommended that port authorities be given explicit discretion to license towage operators, subject to safeguards that protect and promote towage user interests.
  \item \textsuperscript{417} Parliamentary Secretary to the Treasurer, Ian Campbell, \textit{Productivity Commission Inquiry: Economic Regulation of Harbour Towage and Related Services} (Media release, March 2003).
  \item \textsuperscript{419} The \textit{National Security Act 1939} and \textit{Wheat Acquisition Regulations 1939}. This was later replaced by the \textit{Wheat Industry Stabilization Act 1946} and complementary State legislation.
  \item \textsuperscript{420} \textit{Wheat Marketing Act 1989}.
\end{itemize}
owners who became accredited wheat exporters might deny other exporters equal access to their bulk-handling port facilities (e.g. ship loaders, intake/receival facilities and grain storage facilities at ports).

Under the *Wheat Export Marketing Act 2008* and *Wheat Export Accreditation Scheme 2008*, if an exporter (or an associated entity) provides a port terminal service, WEA must be satisfied that they pass the ‘access test’ for the exporter to be eligible for accreditation. The access test requires exporters applying for accreditation from 1 October 2009 to comply with continuous disclosure rules and either:

- have an access undertaking in place under Part IIIA of the TPA (governing access by accredited wheat exporters to the port terminal service for the export of bulk wheat), or

- be subject to a State/Territory regime, certified as effective under Part IIIA of the TPA, for access to the port terminal service.

By May 2009 three port terminal services access undertakings had been submitted to the ACCC. No State or Territory had applied to the NCC for certification of a wheat port access regime. The regime is to be evaluated by the Productivity Commission by 1 July 2010.

In addition to the Commonwealth regime, the Victorian Essential Services Commission is responsible under the *Grain Handling and Storage Act 1995* (Vic) for the economic regulation of certain services at the export grain handling and storage facilities at the ports of Portland, Geelong and Melbourne.

### 8.1.5 Shipping

The innovation of steam propulsion enabled the development in the 1850s of scheduled international shipping services (it was also related to the development of postal services in Australia—the first regular steamer service in 1852 arrived on a mail contract). However, the increased supply of shipping space also resulted in plummeting freight rates. This led to the formation from the 1860s of ‘conferences’ where carriers coordinate the supply of shipping services. In 1876, for example, the London-based Melbourne Shipping Association was formed consisting of eight firms interested in the shipping trade between London and Adelaide, Brisbane, Melbourne and Sydney.

---

422 For example, Graincorp, CBH and ABB handle the accumulation, logistics and storage of the Australian wheat crop.


424 A different access test applies prior to 1 October 2009.


427 Lee (2003, chapter 2).
In 1913 the Oversea Shipping Representatives Association was formed in Sydney to represent all the conference lines trading to Australia.  

In 1930 the *Australian Industries Preservation Act 1906* was amended to exempt certain conferences from competition law. As in other countries, the Australian Government considered that it was in the interests of Australian shippers (exporters and importers) to allow conferences to provide coordinated scheduled liner services (although, at times, the Australian Government has also competed against private ship owners).  


Since 1974, there have been five major reviews of competition regulation for liner shipping in Australia: a 1978 review; a 1986 review, which led to the replacement of Part X of the TPA in 1989; a 1993 review; a 1999 review by the Productivity Commission, which led to amendments to Part X in 2000; and a 2004 review by the Productivity Commission, which recommended the repeal of Part X. The Australian Government, in its response to the 2004 review, proposed to retain Part X but with amendments ‘to promote further competitive reform of the international liner cargo shipping sector in Australia’. As at 20 March 2009, no Bill had yet been introduced.

---

428 Bach (1976, p. 301).
429 *Australian Industries Preservation Act 1930*.
432 Inserted by the *Trade Practices Act 1966*.
433 Department of Transport (1978).
434 Department of Transport (1986).
8.1.6 Logistics chain coordination

In recent years, the focus has shifted to ‘end-to-end supply chain’ solutions. Infrastructure Australia observed:441

For ports, ten years ago, the emphasis in the maritime freight sector was on waterfront reform to increase productivity levels and ship turnaround times; today, the focus is on port physical capacity and landside links. Recent rapid growth in demand at many of Australia’s ports is placing strain on landside road and rail capacity and supply chain links from the ports.

In June 2004 the Federal Government released the AusLink White Paper which established a coordinated planning and investment framework for national land transport.442 In its 2007 review, the Exports and Infrastructure Taskforce recommended that AusLink be expanded to include ports as the final link in the export chain.443

8.2 Current regulation

The economic regulation of ports and shipping in Australia consists of the following components.

8.2.1 Ports

As at 20 March 2009, no port facilities had been declared under Part IIIA of the TPA, and nor had any State/Territory port access regime been certified as effective.444

In South Australia, Queensland and Victoria, pricing and access are regulated by an independent State regulator. In New South Wales, the Northern Territory, Tasmania and Western Australia, there is shareholder ministerial445 oversight of port charges.

8.2.2 Container stevedoring

Under Part VIIA of the TPA, the ACCC is required to monitor and report annually on prices, costs and profits relating to the supply of services by container terminal operator companies at the ports of Adelaide, Brisbane, Burnie, Fremantle, Melbourne and Sydney.446

8.2.3 Wheat export ports

After 1 October 2009 wheat exporters who also operate grain storage and handling facilities at ports are required, in order to be accredited, to have an undertaking accepted by the ACCC under Part IIIA of the TPA (unless there is an ‘effective’

442 Department of Transport and Regional Services (2004).
443 Exports and Infrastructure Taskforce (2005, p. 5).
444 In 2001 South Australia applied to the NCC for certification of its access regime for ports and maritime services. The application was withdrawn in 2002.
445 The ‘shareholder Minister’ is the minister in whose office the shares of the GBE are vested.
446 See the most recent report: Australian Competition and Consumer Commission (2008).
State/Territory port terminal service access regime in place under Part IIIA).\textsuperscript{447} The undertakings will govern access to the port terminal facilities by other accredited wheat exporters.

8.2.4 Liner shipping

Part X of the TPA regulates Australia’s international liner cargo shipping services (liner cargo ships that sail between Australia and other countries). The main object of Part X is to ensure that Australian exporters and importers have access to shipping services of “adequate frequency capacity and reliability at freight rates which are internationally competitive”.\textsuperscript{448}

Part X allows international liner cargo shipping operators to collaborate as conferences (e.g. to coordinate services to and from Australia by agreeing on prices, sharing of capacity or schedules). The parties to a conference agreement may apply to the Registrar of Liner Shipping (Department of Infrastructure, Transport, Regional Development and Local Government) for the registration of the agreement.

If the conference agreement is registered, the parties have a conditional exemption from s. 45 (contracts etc. that restrict dealings or affect competition) and s. 47 (exclusive dealing) in Part IV of the TPA.

The ACCC may investigate whether grounds exist for the minister to deregister a conference agreement. The main ground for deregistration is a breach by the parties to the agreement of requirements imposed on them by Part X. These include a requirement on the parties to a registered conference agreement to negotiate with, and provide information to, designated shipper bodies (in effect, bodies representing exporters and importers).

Designated shipper bodies are also exempt from ss. 45 and 47 of the TPA to enable them to negotiate collectively without first seeking authorisation under Part VII.

Part X also regulates unfair pricing practices, and non-conference international liner cargo operators with substantial market power.

8.2.5 Logistics chain coordination

Where a port forms part of a logistics chain for the export of a product, there may be a commercial incentive for all participants in the chain to work together to maximise throughput. Such an agreement may require authorisation by the ACCC under Part VII of the TPA.\textsuperscript{449} Examples of authorisations include the Queensland Dalrymple Bay Coal Terminal (a queue management system designed to address the imbalance between demand for coal-loading services at Dalrymple Bay and the capacity of the Goonyella

\textsuperscript{447} Wheat Export Marketing Act 2008.

\textsuperscript{448} TPA, s. 10.01.

\textsuperscript{449} An authorisation under Part VII of the TPA is, in effect, an exemption from the anti-competitive conduct provisions in Part IV.
coal chain\textsuperscript{450} and New South Wales Hunter Valley coal chain (a capacity balancing system at the Port of Newcastle).\textsuperscript{451}

\textsuperscript{450} The ACCC granted authorisation until 31 December 2008 as a transition period to enable a long-term solution to excessive vessel queues to be developed and implemented. On 23 February 2009, the ACCC issued a draft determination proposing to deny authorisation to users of Dalrymple Bay Coal Terminal to extend the operation of their Queue Management System: www.accc.gov.au/content/index.phtml/itemId/861793/fromItemId/621581 (accessed 15 March 2009).

\textsuperscript{451} The ACCC granted interim authorisation until 31 March 2009: www.accc.gov.au/content/index.phtml/itemId/853994/fromItemId/621581.
9. Water

The water industry comprises water, wastewater (sewerage) and drainage (WSD) services. The facilities required to deliver a water service can be broadly classified as: production or headwork; transportation; and retail supply. A wastewater service consists of retail supply (customer connection); distribution (the small pipe network to transport sewage from source to trunk network); bulk transmission; treatment works; and, in some cases, facilities for reuse of treated wastewater.

The range of facilities required to deliver a drainage service include a local drainage collection facility (e.g. underground drainage pipelines and channels from properties and public areas) and transportation/disposal (e.g. to waterways). This section describes the historical regulation of WSD services in Australia, and the current economic regulation of water infrastructure.

9.1 Background

WSD services typically have been provided in Australia by vertically integrated State or local government enterprises that operate as regionally defined monopolies. The Commonwealth’s role was mainly limited to research, providing financial assistance and coordinating the management of water resources that crossed State boundaries (in particular, the Murray–Darling Basin, which extends over New South Wales, Victoria, Queensland, South Australia and the Australian Capital Territory).

In 1991, in response to water shortages and environmental problems such as salinity and outbreaks of toxic blue green algae, the Industry Commission was asked to review...
the regulatory arrangements for water resources and waste water disposal. In response to the report, COAG established a working group and, in 1994, agreed to a Water Resources Policy covering consumption-based and full-cost recovery water pricing, allocations and trading, environmental and water quality, and public education. The reforms formed part of the 1995 competition policy reform agreements.

Following severe drought in 2002, COAG agreed in 2004 to a National Water Initiative. The Initiative is intended to provide:

- greater certainty for investment and the environment, and underpin the capacity of Australia’s water management regimes to deal with change responsively and fairly.

Elements of the Initiative include:

- A process for returning over-allocated surface and groundwater systems to environmentally sustainability levels of extraction.

- Perpetual access entitlements for a share of the water resource available for use (rather than a fixed-term entitlement with no guarantee of renewal). The Agreement includes a framework for assigning risks of future reductions in the availability of water for consumptive use. As part of this framework,

---

456 Following the Industry Commission report, the Commonwealth also proposed a new Agriculture and Resource Management Council of Australia and New Zealand to replace the Australian Agriculture Council, Australian Soil Conservation Council and Australian Water Resources Council. The objective was to implement an institutional reform to complement the changes in behaviour of resource owners and managers that were being encouraged at that time. ARMCANZ was established in October 1992. See www.mincos.gov.au/background.htm#anzec.

In addition, a new Murray–Darling Basin Agreement was signed by the Commonwealth, New South Wales, Victoria and South Australia in 1992; this was reflected in Commonwealth and State legislation (Murray–Darling Basin Act 1993 (Cwlth)). Queensland became a signatory in 1996, and the Australian Capital Territory formalised its participation through a memorandum of understanding in 1998. The Agreement continued the Murray–Darling Basin Ministerial Council and Murray–Darling Basin Commission. The partnership between the various bodies in giving effect to the agreement was called the Murray–Darling Basin Initiative: See www.mdbc.gov.au/about/the_mdbc_agreement.

459 Under the Agreement to Implement the National Competition Policy and Related Reforms (11 April 1995), the Commonwealth agreed to provide financial payments to the States and Territories in return for them meeting certain obligations, including the implementation of COAG agreements on water reforms. An intergovernmental task force was established by ARMCANZ to manage and report on the COAG water reforms.
461 Intergovernmental Agreement on a National Water Initiative (25 June 2004), paragraph 5. The Agreement was signed by the Commonwealth, New South Wales, Victoria, Queensland, South Australia, Australian Capital Territory and Northern Territory. Tasmania and Western Australia signed after the initial signatories.
Governments are to compensate users for changes in entitlements resulting from changes in government policy.

- The development of a water market structure in which trading is not limited to catchment areas.
- Continued implementation of full-cost recovery pricing for water in both urban and rural sectors. Independent bodies are to be used to set prices for water storage and delivery by government water service providers.
- The establishment of the National Water Commission, funded by the Commonwealth, to assess progress. Implementation of the Initiative is overseen by the Natural Resource Management Ministerial Council.

The Commonwealth, New South Wales, Victoria, South Australia and the Australian Capital Territory also signed the Intergovernmental Agreement on Addressing Water Overallocation and Achieving Environmental Objectives in the Murray–Darling Basin (25 June 2004). This established a framework for the investment of $500 million to fund water recovery in the Murray–Darling Basin.

In addition, in 2006, a discussion paper issued by the Commonwealth sought comment on the need for a national access code for water.

In 2007, in response to the protracted drought and concerns about ‘shortcomings of the current model’, the Prime Minister announced the National Plan for Water Security. The Commonwealth proposed to seek the agreement of New South Wales, Victoria, Queensland, South Australia and the Australian Capital Territory to transfer powers to enable the Commonwealth to oversee water management in the Murray–Darling Basin. Following Victoria’s decision not to participate, the Commonwealth enacted the Water Act 2007, based on the Commonwealth’s existing constitutional powers. The Act was amended in 2008 after all parties entered into the Agreement on Murray–Darling Basin Reform (3 July 2008).

---

463 The Natural Resource Management Ministerial Council was established in 2001 in place of ARMCANZ: Council of Australian Governments, Communique, Canberra, 8 June 2001.
464 Known as the Living Murray Intergovernmental Agreement.
465 Department of the Prime Minister and Cabinet (2006).
466 Prime Minister, John Howard (2007).
467 The Water Amendment Act 2008 commenced on 15 December 2008. The amendments give effect to the intergovernmental signed by the Prime Minister, and the Premiers of New South Wales, Victoria, Queensland and South Australia and the Chief Minister of the Australian Capital Territory at the COAG meeting on 3 July 2008. The Water Amendment Act 2008 is based on a combination of Commonwealth constitutional powers and a referral of certain powers from the Basin States to the Commonwealth.
9.2 Current regulation

9.2.1 Access to WSD infrastructure

The States and Territories regulate urban water and wastewater, and rural water outside the Murray–Darling Basin. In particular:

- Australian Capital Territory (Independent Competition and Regulatory Commission):
  - Independent Competition and Regulatory Commission Act 1997

- New South Wales (Independent Pricing and Regulatory Tribunal):
  - Independent Pricing and Regulatory Tribunal Act 1992
  - Hunter Water Act 1991
  - Sydney Water Act 1994
  - Sydney Water Catchment Management Act 1998

  The New South Wales Government applied to the NCC on 19 December 2008 for a recommendation that the access regime (in the Water Industry Competition Act 2006 and Water Industry Competition (Access to Infrastructure Services) Regulation 2007) is an effective access regime.

- Northern Territory (Water Management Branch):
  - Northern Territory Water Act.

- Queensland (Department of Natural Resources and Water):
  - Water Act 2000
  - Water Supply (Safety and Reliability) Act 2008 (recycled and drinking water).

- South Australia (Essential Services Commission of South Australia):

- Tasmania:

- Victoria (Essential Services Commission):
  - Essential Services Commission Act 2001
  - Water Industry Act 1994, Part 1A
  - Water Industry Regulatory Order made under s. 4D of the Water Industry Act 1994.
• Western Australia (Economic Regulation Authority):

WSD infrastructure services may be declared under the economy-wide access regime in Part IIIA of the TPA. Sewage transmission and interconnection services provided by Sydney Water Corporation Ltd were declared in 2005 upon application by Services Sydney. An application from Lakes R Us for the declaration of water storage and transport services provided by Snowy-Hydro was rejected in 2006.

9.2.2 Murray–Darling Basin

The Commonwealth Water Act 2007 establishes the Murray–Darling Basin Authority, which reports to the Commonwealth Minister for the Environment and Water Resources. In summary:

• The Authority is required to prepare a Basin Plan for adoption by the minister. The Plan includes limits on the quantity of water that may be taken from Basin water resources (known as long-term average sustainable diversion limits) and rules about trading of water rights. The ACCC has a role in advising the Authority on the development of the water trading rules.

• The Act sets out the kinds of charges in relation to Basin water resources which are referred to broadly as ‘regulated water charges’. They include fees or charges payable to an irrigation infrastructure operator; bulk water charges (excluding urban water supply activities); water planning and water management charges; and fees or charges arising from access to water service infrastructure. The rules governing these charges (known as water charge rules) are to be made by the minister after obtaining the advice of the ACCC. The ACCC is also required to monitor regulated water charges.

• The Act allows the minister, after obtaining advice from the ACCC, to make ‘water market rules’ which govern the restrictions that an irrigation infrastructure operator may impose in relation to ‘transformation arrangements’ (essentially, the arrangements whereby a share of a ‘group’ water access entitlement of the operator may be permanently transformed into a water access entitlement of a person other than the operator).

---

468 The application for declaration was received by the NCC from Services Sydney Pty Ltd in 2004. In 2005 the Premier of New South Wales was deemed to have made a decision not to declare the services. Services Sydney sought review of the Premier’s decision by the Australian Competition Tribunal. On 21 December 2005 the Tribunal handed down its decision to set aside the deemed decision of the Premier and to declare the services. On 22 June 2007, the ACCC made a final arbitration determination in respect of an access dispute between Services Sydney and Sydney Water.

469 The application for declaration was received by the NCC in 2004. On 6 January 2006 the acting Premier of New South Wales determined that the services should not be declared. On 29 January 2006, Lakes R Us Pty Ltd applied to the Australian Competition Tribunal for review of the decision not to declare the service. On 26 May 2006, Lakes R Us sought to withdraw its application for review. Leave to withdraw was granted on 31 May 2006.
• The ACCC is responsible for enforcing the water charge rules and water market rules.
10. Petrol

The petroleum industry involves exploration, extraction, refining the petroleum (in liquid form, crude oil), distribution and retailing. The principal petroleum products are automotive gasoline or spirit (petrol), automotive diesel fuel (diesel), aviation turbine fuel, aviation gasoline and liquefied petroleum gas (LPG). The products are marketed by oil refineries through three channels: direct to commercial customers; through retail outlets to individual consumers; or through wholesalers to commercial customers, retailers and consumers. This section describes the historical regulation of petroleum pricing, and the current regime.

10.1 Background

Following the invention of the internal combustion engine in the mid-nineteenth century, the first petrol importing business was established in Australia in 1901. The Commonwealth introduced a customs duty in 1901 as a revenue-raising measure. In later years, the principal rationale for the tariff was to protect local production. For example, in 1925 the Tariff Board recommended increased tariffs for fuel oil to aid the development of the Australian shale oil industry. In 1929, when domestic refineries were established, an excise duty was introduced to fund road development.

The outbreak of World War II led to the imposition of price controls on petroleum products by the Commonwealth. From 1948 prices were controlled by State Governments. However, by the mid-1950s, there was only one remaining State authority setting prices. The South Australian Prices Commissioner in effect acted as a price setting authority for the whole of Australia with the industry in each State generally adopting, voluntarily, the Commissioner’s findings. The South Australian price controls under the Prices Act 1948 were based on maximum cost-based wholesale prices plus country freight differentials.

In 1961 the first Australian commercial oil discovery was made at the Moonie field in Queensland. Production commenced in 1964. In 1964, as an incentive for domestic exploration and production of petroleum, the Commonwealth introduced a crude oil

---

471 A customs duty is a tax on the importation of goods, in contrast to an excise duty, which is a tax on goods produced in Australia.
472 Customs Act 1901 and Customs Tariff 1902, Schedule, item 84.
473 Tariff Board (1925).
474 Excise Act 1901 and Excise Tariff 1921–29, Schedule, item 11.
478 Industries Assistance Commission (1976, p. 5).
allocation scheme. The press statement relating to the minister’s referral to the Tariff Board stated:

479 Neither Government nor private companies can be expected to continue investing millions of pounds each year in the search for oil unless there is some surety that a reasonable market will be available for any commercial discovery. The Tariff Board has therefore been asked what protection should be accorded to commercial production of local crude oil so that it will be marketed under conditions sufficiently remunerative to ensure that the search for oil is continued with vigour.

Under the Scheme, refiners were required to take a certain amount of Australian crude oil before they could import crude oil. Import duties were set so as to ensure that companies purchased their allocations of crude oil at prices assessed in accordance with the method of valuation determined by the Tariff Board. 480 The initial price for oil from the Moonie field was based, in part, on the concept of import parity pricing. Under import parity pricing, the domestically produced product is priced at the cost of the equivalent imported product. However, until 1977 the price of allocated crude oil was largely set independently of the world market. 481

Following the first oil shock in the early 1970s 482, the price of wholesale petroleum products was regulated, from 1973, by the Prices Justification Tribunal. The Prices Justification Act provided for the Prices Justification Tribunal to review, rather than set, prices. Subject to exemptions, the Prices Justification Act applied to all companies with an annual turnover in excess of a prescribed amount. However, the Prices Justification Tribunal opted to conduct an inquiry into a price increase proposed by a company where it was ‘likely to achieve the greatest impact in terms of an anti-inflationary role’.

For petroleum products, prices were affected by significant increases in the prices of imported crude oil and wages costs. The Prices Justification Tribunal’s approach was to determine industry-wide maximum wholesale prices for petroleum products on the basis of costs, which were then adjusted in light of submissions by individual companies to the Prices Justification Tribunal. 483

The Tribunal was replaced by the Petroleum Products Pricing Authority (PPPA) in 1981. 484 During this time, New South Wales, Victoria, South Australia and Western Australia reintroduced forms of wholesale and retail price control. 485

---

481 See Industries Assistance Commission (1976). From 1970, increases in world prices made the prices received by local producers of crude oil less than import parity.
482 Members of the Organization of Arab Petroleum Exporting Countries (OAPEC, consisting of the Arab members of OPEC, plus Egypt and Syria) announced that they would no longer ship petroleum to nations that had supported Israel in its conflict with Syria and Egypt.
483 Prices Justification Tribunal (1975, p. 7); Prices Justification Tribunal (1976, p. 33).
484 The Petroleum Products Pricing Act 1981 followed the repeal of the Prices Justification Act. Under the Act, a declared company that supplied particular wholesale petroleum products was required to
From 1977, following an inquiry by the Industries Assistance Commission, the price of allocated Australian crude oil was determined as a percentage of the import parity price. While this provided gains to producers with established low-cost Australian oil fields, it was considered that artificially holding down the price would, among other things: encourage increased consumption of a scarce resource; and discourage investment in oil exploration and development, and substitute energy sources. However, price controls were retained as immediate abolition would 'add to the Government’s difficulties in reducing inflation'.

In 1980 the Commonwealth enacted the Petroleum Retail Marketing Sites Act (Sites Act) and Petroleum Retail Marketing Franchise Act (Franchise Act) to address an imbalance in market power between the oil companies (refiners) and petrol retailers, and to in turn promote competition through diversity at the retail level. The Sites Act reduced the level of direct operation of petroleum retail marketing sites by corporations engaged in the refining of petroleum. The Franchise Act contained provisions that sought to secure the position of franchisees.

In 1984 the PPPA was subsumed by the Prices Surveillance Authority. The major oil companies were required to notify the Prices Surveillance Authority of proposed price increases for the supply of certain wholesale petroleum products including motor spirit (petrol) and automotive distillate (diesel). At the retail level, service station operators were free to set prices as market conditions allowed. Like the Prices Justification Tribunal and the PPPA, the Prices Surveillance Authority calculated, for the surveillance of prices, a common base price for all capital cities in which refineries were situated. The base price in turn was derived using a cost-based procedure that

notify the PPPA of a price increase (s. 19). In effect, the PPPA determined a maximum capital city price for each declared company. See Petroleum Products Pricing Authority (1982).

486 Industries Assistance Commission (1976, pp. 1–2).
489 The Act required the reduction of company-operated sites by about 50 per cent and allocated to each company a quota to be achieved over two years.
490 The Prices Surveillance Authority also replaced State and Territory regulation of wholesale petrol prices: see Prices Surveillance Authority (1984B, pp. 7–9). Declaration under the Prices Surveillance Act 1983, dated 13 March 1984 (Commonwealth of Australia Gazette, No. s. 106, 15 March 1984, p. 2). The declarations made at that time covered petroleum products; the transmission of standard postal articles and registered publications by ordinary post; and certain telephone and telegraph services. The Price Surveillance Authority referred to the government policy that the goods and services to be subject to surveillance would be those where ‘effective competitive disciplines are not present and where price or wage decisions have pervasive effects throughout the economy’; see Prices Surveillance Authority (1984A, p. 5).
included the price of crude oil. Local maximum wholesale prices were then determined in light of State Government franchise fees, low lead premiums and freight differentials.492

In 1987, in an environment of declining self-sufficiency in crude oil, the Government announced the cessation of the Crude Oil Allocation Scheme, to take effect from 1 January 1988.493 The decision meant that refiners and crude oil producers could negotiate, without government intervention, the quantities and prices of crude oil.494 Following deregulation of crude oil prices, the Prices Surveillance Authority (and, in turn, the ACCC from 1995) adopted a new formula for calculating the maximum wholesale prices of petrol and diesel based on the refined petrol price in Singapore.495

In August 1990, after a spike in the price of oil caused by the Iraqi invasion of Kuwait, the Commonwealth Treasurer, under the Prices Surveillance Act, froze wholesale petrol prices for 21 days, and directed the Prices Surveillance Authority to hold a public inquiry into the pricing and supply of wholesale and retail petroleum products by the six refining companies. Under the interim pricing system, wholesalers were not fully compensated for increases in crude oil prices in that period.496

In 1998, in response to reports by the Industry Commission and the ACCC498, formal prices surveillance of oil companies ceased as part of the Government’s reform package for the petroleum industry.499 The Government considered that:

---


494 In general, the crude oil prices negotiated between producers and refiners continue to be limited by the cost of the refiner’s import alternative (import parity).

495 From 1 February 1990 the Prices Surveillance Authority introduced a procedure under which oil companies were able to notify increases in list prices at any time and receive immediate Prices Surveillance Authority endorsement provided that the price proposed remained at or below the intervention level on that day. Until 1998 the daily maximum wholesale price (intervention price) was made up of three components: the import parity component (the ‘landed cost’ for petrol from Singapore); the local component (which recognised distribution and marketing costs and an allowance for profit); and subsidies and excise.

For sales by the major oil companies in non-refinery locations, the ACCC determined maximum wholesale prices by calculating an additional allowance (the freight differential) above city prices for freight costs for approximately 4000 locations around Australia. See Prices Surveillance Authority (1989, p. 21); Prices Surveillance Authority (1991B); and Australian Competition and Consumer Commission (1996, vol. 1 p. 58).

496 Retail margins on petrol sold from company owned sites were also frozen.

497 See Prices Surveillance Authority (1990C).

498 Industry Commission (1994); Australian Competition and Consumer Commission (1996); see also Trade Practices Commission (1988). The reports recommended the termination of prices...
price surveillance of petrol prices and the setting of a maximum endorsed wholesale price has had an adverse effect on the retail petrol market.

However, the oil majors agreed to support an independent price monitoring system for 100 country towns to be monitored by the Australian Automobile Association and the ongoing monitoring of petrol prices by the ACCC, with a particular focus on hot spots. The reforms included two other key elements:

- repeal of the Sites Act and Franchise Act, and a strengthened Oilcode, to streamline the regulatory framework for the retail petroleum industry and remove structural restrictions on competition.
- agreement by the oil majors that customers for bulk fuel supply would be able to access directly terminals for supply, and to establish and fund a mediator to deal with any disputes on terminal access.

However, in September 1999 the Government announced that it would not proceed with the Oilcode and repeal of the Sites Act and the Franchise Act because of lack of industry agreement.

In 2001 the Federal Government asked the ACCC to examine the feasibility of placing limitations on petrol and diesel retail price fluctuations throughout Australia. The ACCC did not support options to limit price cycles but instead recommended that a consumer awareness campaign be launched to increase consumers’ understanding of price cycles, and to help consumers buy petrol at times when prices are relatively low. In 2002, in response to consumer concerns about fluctuations in retail petrol prices, the ACCC’s informal monitoring role was extended to informing consumers about how to exploit petrol price cycles.

surveillance of petrol and diesel, and that State and Territory Governments should not regulate petrol prices. The ACCC inquiry found that in the capital cities the maximum endorsed wholesale price acted as a target for prices at the end of a discount cycle and in the country, the maximum endorsed wholesale price acted as a price floor, underwriting the price paid by country consumers. Price notification had the effect of elevating wholesale prices above where they would have otherwise been. The Sites Act and Franchise Act were considered to have restrained competition by limiting the ability of the majors to compete with retailers operating outside the Acts (in particular, supermarkets and independent importers/marketers).

499 Treasurer, the Hon. Peter Costello, and Minister for Industry, Science and Tourism, the Hon. John Moore, Joint Statement: Petroleum Marketing Reforms (Media release No. 068, Melbourne, 20 July 1998). From 1 August 1998, petrol and diesel prices were deregulated and wholesalers were free to set their own prices based on market conditions.

500 For example, in 1999 the Government asked the ACCC to consider how international crude oil price movements had been translated into Australian retail prices: Australian Competition and Consumer Commission (1999).


503 See Australian Competition and Consumer Commission, Major Initiative to Inform Consumers How to Exploit Petrol Price Cycles Launched by ACCC (Media release 289/02, 20 November 2002).
In 2004, when oil prices increased because of growing demand in the United States and China and the occupation of Iraq in 2003, the Government announced that it would continue to pursue industry consensus to allow the implementation of the Government’s 1998 Downstream Petroleum Reform Package.\(^{504}\) As a consequence, on 1 March 2007 the Sites Act and Franchise Act were replaced by a mandatory industry code under the TPA (the Oilcode).\(^{505}\) Key elements of the Oilcode include:

- establishment of minimum standards for petrol re-selling agreements between retailers and their suppliers
- introduction of a nationally consistent approach to terminal gate pricing (TGP) arrangements to improve transparency in wholesale pricing and allow access for all customers, including small businesses, to petroleum products at TGP
- establishment of an independent downstream petroleum dispute resolution scheme to provide the industry with an ongoing cost-effective dispute resolution mechanism as an alternative to taking action in the courts.

In 2006 a Senate inquiry was held into petrol pricing.\(^{506}\) In response to a divergence between international benchmark prices and the domestic retail price of petrol, the Commonwealth Treasurer approved\(^{507}\), on 15 June 2007, the holding (under Part VIIA of the TPA) of an ACCC inquiry into the price of unleaded petrol.\(^{508}\) Subsequently, the new Federal Labor Government directed the ACCC to monitor unleaded petrol prices under Part VIIA and proposed the establishment of a petrol commissioner.\(^{509}\) A Bill proposing to establish FuelWatch (a petrol price monitoring scheme) was rejected by the Senate in 2008.\(^{510}\)

---

\(^{504}\) Minister for Industry, Tourism and Resources, the Hon. Ian Macfarlane, MP, *Macfarlane to Proceed with Retail Petrol Reform* (Media release, 7 December 2004).


\(^{506}\) Senate Standing Committee on Economics (2006).

\(^{507}\) Treasurer, the Hon Peter Costello MP, *ACCC to Inquire into Petrol Prices* (Media release No. 050, Melbourne, 15 June 2007).

\(^{508}\) Australian Competition and Consumer Commission (2007). The report concluded (p. v):

> While the industry is essentially competitive, this inquiry has brought to light some fundamental structural issues that raise concerns about current operations and future competitiveness:

- the Australian refining industry is relatively concentrated
- there are significant barriers to entry at the refining level.

\(^{509}\) Assistant Treasurer and Minister for Competition Policy and Consumer Affairs, the Hon. Chris Bowen, *Petrol Prices and Australian Consumers: Release of the ACCC Report into Unleaded Petrol Prices* (Media release No. 002, 18 December 2007).

\(^{510}\) In summary, the Bill sought to establish a National FuelWatch Scheme under which petrol retailers would notify the ACCC of their next day’s fuel prices by 2.00 pm each day and maintain this notified price for a 24-hour period from 6:00 am the next day: National FuelWatch (Empowering
10.2 Current regulation

All States and Territories currently have legislation under which petroleum product prices could be regulated. However, the regimes are regarded as reserve powers, and currently do not have a direct impact on petroleum product prices:

- Australian Capital Territory: *Fair Trading (Fuel Prices) Act 1993*[^11]
- New South Wales: *Prices Regulation Act 1948*[^12]
- Northern Territory: *Price Exploitation Prevention Act*[^13]
- Queensland: *Liquid Fuel Supply Act 1984*[^14]
- South Australia: *Prices Act 1948*[^15]
- Tasmania: *Petroleum Products Emergency Act 1994*[^16]
- Victoria: *Fuel Prices Regulation Act 1981*[^17] and *Petroleum Products (Terminal Gate Pricing) Act 2000*[^18]
- Western Australia: *Petroleum Products Pricing Act 1983*[^19]

[^11]: Section 4 of this Act allows the minister, on the recommendation of the Commissioner for Fair Trading, to set maximum prices for fuel in the ACT.
[^12]: Under s. 19 of this Act, the minister may declare goods or services by notice in the *Gazette*. The Independent Pricing and Regulatory Tribunal then has the power to fix maximum prices for declared goods, either generally or in any part of New South Wales (s. 20).
[^13]: Under s. 19 of this Act, the Northern Territory Administrator may declare specified goods or services. The Controller of Prices may fix maximum prices for declared goods if necessary to prevent price exploitation in the aftermath of a natural disaster or resulting from the failure of other laws to: protect consumers from monopolies; or ensure consumers benefit from competitive markets (s. 20). The Controller may set maximum prices either generally or in any part of the Northern Territory.
[^14]: Queensland legislation provides for petrol price controls only in cases of emergency. The Act allows the minister to regulate the price of petrol, but only where there is a shortage or anticipated shortage of fuel.
[^15]: Under s. 19 of this Act, the Governor may declare specified goods or services. The minister may then fix maximum prices for declared goods, either generally or in any part of South Australia (s. 21).
[^16]: The Act provides for petrol price controls only in cases of emergency. The Act allows the minister to regulate the price of petrol, but only where there is a shortage of fuel.
[^17]: Under s. 6 of this Act, the minister may declare any kinds of fuel, either generally or in any part of Victoria. The Prices Commissioner may set maximum prices for declared fuel (s. 7).
[^18]: The Act requires a declared supplier to determine, using a specified formula, a price (the terminal gate price) per litre for the sale of declared petroleum products to a distributor or retailer (s. 5). Terminal gate prices must be publicly available and may only change once in 24 hours. The price at which the supplier sells the petroleum product is determined by adding the terminal gate price to other specified costs including transportation (s. 6).
At the Commonwealth level, the ACCC:

- is required, under Part VIIA of the TPA, to monitor, and report annually on, for a three-year period from 18 December 2007, the prices, costs and profits relating to the supply of unleaded petroleum products in the petroleum industry.\(^{520}\)

- conducts informal monitoring of: the retail prices of petrol (including ethanol blended fuel),\(^{521}\) diesel and automotive LPG in the capital cities and around 110 country towns; international crude oil and refined petrol prices;\(^{522}\) published terminal gate prices of the oil companies and some independents; and the city-country retail price differential

- publishes information about price cycles to guide consumers about when to buy petrol

- is responsible for enforcing the Oilcode under the TPA

- administers the general competition law provisions in Part IV of the TPA\(^{523}\) (e.g. under Part VII of the TPA, the ACCC reviews the tying of petrol discounts to grocery sales).\(^{524}\)

\(^{519}\) Section 10 of this Act allows the minister to declare petroleum products. The Commissioner may then set maximum prices for declared products, either generally or in parts of Western Australia (s. 12). In respect of the wholesale supply of motor fuel, the Act requires a declared terminal to: display the price at the place of sale (s. 22B); and supply motor fuel at that price (s. 22G). In respect of the retail supply of motor fuel, the Petroleum Products Pricing Regulations 2000 (WA) made under the Act requires a retailer to set (and display) the retail price for a 24-hour period commencing at 6:00 am and limits intraday price movements (reg. 3).


\(^{521}\) In 2006, in response to public concerns that ethanol-blended fuel should be cheaper than normal unleaded petrol, the Government announced that the ACCC would extend its monitoring of petrol prices to include E10 (ethanol-blended fuel) and provide a report on the price differential between E10 petrol and unleaded petrol on a quarterly basis: Treasurer, the Hon. Peter Costello MP, Australian Competition and Consumer Commission to Monitor Ethanol Blended Fuel (E10) Prices (Media release No. 082, Canberra, 8 August 2006); Ministerial Statement: Energy Initiatives: Australia, Debates, House of Representatives, 14 August 2006, p. 40 (The Prime Minister, Mr Howard).

\(^{522}\) The relevant benchmark price for crude oil in Australia is Tapis crude oil (from Malaysia). The spot price of Singapore Mogas 95 Unleaded (the average daily price of unleaded refined petrol traded in Singapore) continues to be used as the benchmark for refined petrol. The difference between the price of Singapore Mogas 95 Unleaded and the price of Tapis crude oil is often known as the refiner margin.


\(^{524}\) See Australian Competition and Consumer Commission (2004).
In addition, under the *Liquid Fuel Emergency Act 1984*, the Commonwealth may control the distribution and sale of fuel when there is a national liquid fuel emergency.\(^{525}\)

---

\(^{525}\) The 1984 Act replaced the *Liquid Fuel (Defence Stocks) Act 1949*. 
11. Conclusion

The continent of Australia has gone from supporting a population of 315,000 indigenous inhabitants in 1788 to providing for a population of around 21 million.\textsuperscript{526} From the 11 ships of the First Fleet, Australian government expenditure as a percentage of gross domestic product is now the third lowest of all 30 OECD countries.\textsuperscript{527} Instead of sending telegraphs, Australians now use their mobile phones.\textsuperscript{528}

Regulatory regimes need to evolve in response to changing market conditions and objectives.\textsuperscript{529} In Australia, this has meant a shift from government departments to arm’s-length statutory corporations to open competition, privatisation and independent regulators. Notably, the life span of a regulatory regime has considerably shortened—although the legislation has become longer. The Post and Telegraph Act as enacted in 1901 was 43 pages. Today’s\textsuperscript{530} Telecommunications Act 1997 and Parts XIB and XIC of the TPA together come to 830 pages.

Where is economic regulation likely to head in the future? Following the election of the Rudd Labor Government in 2007, Infrastructure Australia was established to improve ‘coordination of infrastructure planning and investment’ and to address ‘blockages to productive investment in infrastructure’.\textsuperscript{531} The current regimes are also scheduled to be reviewed over the next five years.\textsuperscript{532}

Other challenges for Australia have been identified, including climate change policies, turbulence in financial markets and the provision of social infrastructure (such as housing, aged-care services, education and childcare).\textsuperscript{533} While the regulation of utilities has changed significantly over the last 200 years, Australia will continue to be confronted with how to deliver improvements in infrastructure.


\textsuperscript{527} Australian Treasury (2008, section 5.1).

\textsuperscript{528} Data on household use of communication technologies is contained in Australian Bureau of Statistics, \textit{Australian Social Trends 2007: Trends in Household Consumption} (cat. no 4102.0) (released 7 August 2007).

\textsuperscript{529} For example, Bhattacharyya argues that as competition does not automatically follow from privatisation and deregulation, continuing intervention and thus new political/regulatory skills are required: Bhattacharyya (1995, p. 386).

\textsuperscript{530} As in force at 20 March 2009.

\textsuperscript{531} See the objectives of the Infrastructure Working Group, COAG, \textit{Communique}, Melbourne, 20 December 2007.

\textsuperscript{532} In addition to the regime-specific reviews referred to in this paper, the Productivity Commission is currently reviewing social and economic infrastructure regulation: see Productivity Commission (2008).

\textsuperscript{533} See Department of the Prime Minister and Cabinet (2008); Mackay (2007).
## Glossary

<table>
<thead>
<tr>
<th>Abbreviation</th>
<th>Full Form</th>
</tr>
</thead>
<tbody>
<tr>
<td>ACA</td>
<td>Australian Communications Authority</td>
</tr>
<tr>
<td>ACCC</td>
<td>Australian Competition and Consumer Commission</td>
</tr>
<tr>
<td>ACMA</td>
<td>Australian Communications and Media Authority</td>
</tr>
<tr>
<td>AEMC</td>
<td>Australian Energy Market Commission</td>
</tr>
<tr>
<td>AEMO</td>
<td>Australian Energy Market Operator</td>
</tr>
<tr>
<td>AER</td>
<td>Australian Energy Regulator</td>
</tr>
<tr>
<td>Airports Act</td>
<td><em>Airports Act 1996 (Cwlth)</em></td>
</tr>
<tr>
<td>AN</td>
<td>Australian National Railways Commission</td>
</tr>
<tr>
<td>ANL</td>
<td>Australian National Line</td>
</tr>
<tr>
<td>AOTC</td>
<td>Australian and Overseas Telecommunications Corporation</td>
</tr>
<tr>
<td>ARMCANZ</td>
<td>Agriculture and Resource Management Council of Australia and New Zealand</td>
</tr>
<tr>
<td>ARTC</td>
<td>Australian Rail Track Corporation</td>
</tr>
<tr>
<td>AUSTEL</td>
<td>Australian Telecommunications Authority</td>
</tr>
<tr>
<td>Australian Government</td>
<td>The ‘Commonwealth of Australia’ is the legal entity established by the Constitution. It is now conventionally referred to as the ‘Australian Government’ but may also be referred to as the ‘Commonwealth’ or the ‘Federal Government’.</td>
</tr>
<tr>
<td>Australian Postal Corporation Act</td>
<td><em>Australian Postal Corporation Act 1989 (Cwlth)</em></td>
</tr>
<tr>
<td>AWB</td>
<td>Australian Wheat Board</td>
</tr>
<tr>
<td>CAA</td>
<td>Civil Aviation Authority</td>
</tr>
<tr>
<td>COAG</td>
<td>Council of Australian Governments</td>
</tr>
</tbody>
</table>

ACCC/AER working paper No 1, July 2009
<table>
<thead>
<tr>
<th>Term</th>
<th>Definition</th>
</tr>
</thead>
<tbody>
<tr>
<td>Corporatisation</td>
<td>Corporatised public enterprises are constituted as either a limited liability company or as a statutory authority under separate legislation. The process aims to impose private sector commercial incentives and sanctions on public enterprises.</td>
</tr>
<tr>
<td>CPI</td>
<td>(Australia) Consumer Price Index</td>
</tr>
<tr>
<td>CSL</td>
<td>Commonwealth Shipping Line</td>
</tr>
<tr>
<td>DNSP</td>
<td>Electricity distribution network service provider</td>
</tr>
<tr>
<td>FAC</td>
<td>Federal Airports Corporation</td>
</tr>
<tr>
<td>FERC</td>
<td>(US) Federal Energy Regulatory Commission</td>
</tr>
<tr>
<td>FMG</td>
<td>Fortescue Metals Group Ltd</td>
</tr>
<tr>
<td>Franchise Act</td>
<td><em>Petroleum Retail Marketing Franchise Act 1980</em> (Cwlth)</td>
</tr>
<tr>
<td>GBE</td>
<td>government business enterprise</td>
</tr>
<tr>
<td>GDP</td>
<td>gross domestic product</td>
</tr>
<tr>
<td>GPAL</td>
<td>Gas Pipelines Access Law</td>
</tr>
<tr>
<td>LNG</td>
<td>liquefied natural gas</td>
</tr>
<tr>
<td>LPG</td>
<td>liquefied petroleum gas</td>
</tr>
<tr>
<td>MCE</td>
<td>Ministerial Council on Energy</td>
</tr>
<tr>
<td>Melbourne airport</td>
<td>Melbourne Tullamarine Airport</td>
</tr>
<tr>
<td>MIFCo</td>
<td>Maritime Industry Finance Company</td>
</tr>
<tr>
<td>NCC</td>
<td>National Competition Council</td>
</tr>
<tr>
<td>NCP</td>
<td>National Competition Policy</td>
</tr>
<tr>
<td>NECA</td>
<td>National Electricity Code Administrator Ltd</td>
</tr>
</tbody>
</table>
NEL  National Electricity Law
NEM  National Electricity Market
NEMMCO  National Electricity Market Management Company Ltd
NER  National Electricity Rules
NGL  National Gas Law
NGPAC  National Gas Pipelines Advisory Committee
NGR  National Gas Rules
OAPEC  Organization of Arab Petroleum Exporting Countries
OECD  Organisation for Economic Co-operation and Development
Ofcom  (UK) Office of Communications
OFFER  (UK) Office of Electricity Regulation
Ofgas  (UK) Office of Gas Supply
Ofgem  (UK) Office of Gas and Electricity Markets
Ofwat  (UK) Water Services Regulation Authority
OPEC  Organization of the Petroleum Exporting Countries
ORR  (UK) Office of Rail Regulation
OSP  (Telstra) Operational Separation Plan
OTC  Overseas Telecommunications Commission
PPPA  Petroleum Products Pricing Authority
Prices Justification Act  Prices Justification Act 1973 (Cwlth)
Prices Surveillance Act  Prices Surveillance Act 1983 (Cwlth)
RPI  (UK) Retail Price Index
<table>
<thead>
<tr>
<th>Abbreviation</th>
<th>Description</th>
</tr>
</thead>
<tbody>
<tr>
<td>SCO</td>
<td>MCE Standing Committee of Officials</td>
</tr>
<tr>
<td>Sites Act</td>
<td>Petroleum Retail Marketing Sites Act 1980 (Cwlth)</td>
</tr>
<tr>
<td>SMA</td>
<td>Spectrum Management Agency</td>
</tr>
<tr>
<td>Sydney airport</td>
<td>Sydney (Kingsford-Smith) Airport</td>
</tr>
<tr>
<td>Telecom</td>
<td>Australian Telecommunications Commission</td>
</tr>
<tr>
<td>TGP</td>
<td>terminal gate pricing</td>
</tr>
<tr>
<td>TNSP</td>
<td>Electricity transmission network service provider</td>
</tr>
<tr>
<td>TPA</td>
<td>Trade Practices Act 1974 (Cwlth) (also referred to as ‘the Act’)</td>
</tr>
<tr>
<td>TPC</td>
<td>Trade Practices Commission</td>
</tr>
<tr>
<td>UK</td>
<td>United Kingdom of Great Britain and Northern Ireland</td>
</tr>
<tr>
<td>US</td>
<td>United States of America</td>
</tr>
<tr>
<td>USO</td>
<td>universal service obligation</td>
</tr>
<tr>
<td>WEA</td>
<td>Wheat Exports Australia</td>
</tr>
<tr>
<td>WSD</td>
<td>water, wastewater (sewerage) and drainage services</td>
</tr>
</tbody>
</table>
Reference list


—— (1999), Increase in the Average Retail Petrol Prices in Australia Compared with the Rise in International Prices, Canberra, 24 November.

—— (1996), Inquiry into the Petroleum Products Declaration, Canberra, 15 August.


Blainey, Geoffrey (1966), The Tyranny of Distance: How Distance Shaped Australia’s History, Sun Books, Melbourne.


——(1964, reissued 1976), Investment in Australian Economic Development, 1861–1900, Department of Economic History, Research School of Social Sciences, Australian National University, Canberra.


Collins, Bob (1992), Australian Aviation: Towards the 21st Century: A Policy Statement on Reform of Australian Aviation by the Minister for Shipping and Aviation, February.


Copland, Douglas Berry (Commonwealth Prices Commissioner) and Sir Marcus Clark (Adviser to the Commonwealth Prices Commissioner) (1941), Profits and Price Control, Address to the Victorian Branch of the Economic Society of Australia and New Zealand, 26 September 1941, Angus and Robertson, Sydney.


Evans, Senator Gareth QC (1987), *Domestic Aviation: A New Direction for the 1990s: Statement by the Minister for Transport and Communications*, Department of Transport and Communications, 7 October.


Exports and Infrastructure Taskforce (2005), *Australia’s Export Infrastructure* (Report to the Prime Minister), Canberra, May.


Keating, the Hon. P J, MP (1992), *One Nation: Statement by the Prime Minister*, AGPS, Canberra, 26 February.


Minister for Transport and Communications, the Hon. Ralph Willis, MP (1989), *Implementation of GBE Reforms and Telecommunications Pricing*, AGPS, Canberra, 1 June.


Prices Justification Tribunal (1977B), Seatainer Terminals Ltd Matter No S16/76/40, Report, 10 March.


——(1991B), Report to Government on the Recommendations of the Caucus Special Committee of Inquiry into Aspects of the Australian Petroleum Industry (the Wright committee), 28 October.


——(1990A), Inquiry into Charges by the Stevedoring and Container Depot Industries Matter Number PI/90/3, Report No. 34, 19 November.


Senate Standing Committee on Economics (2006), *Petrol Prices in Australia*, 7 December.


Willis, the Hon. Ralph, MP (1989), *Reforming Shipping and the Waterfront: Statement by the Hon. Ralph Willis, MP Minister for Transport and Communications*, AGPS, Canberra.

Western Australia (2006), *Western Australia Port Handbook 2006*.


Updates and amendments

Updates

The first version of this working paper (published July 2009) contains information as at 20 March 2009.

A revised version of this paper will be published in January 2010 to take account of changes up to December 2009.

Amendments

The following corrections have been made since the paper was published in July 2009:

1. Section 5.1 (Airports): The terms of the airport leases were up to 50 years with an option to renew for 49 years.

2. Section 5.1 (Airports): The third phase of privatisation should also include Essendon Airport (2001) and Bankstown, Camden and Hoxton Park Airports (2003).