

Project on Benchmarking International  
Regulatory Processes and Practice

*International Insights on Design and Process for  
Better Economic Regulation of Infrastructure*

**Final Report of the Infrastructure Consultative Committee**

**5 June 2009**



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## Chairman's Note

The ACCC works with a range of consultative and advisory committees to gain community feedback to advance the shared objective – the promotion of competitive, efficient, fair and informed markets. In 2006 a new group was formed, the Infrastructure Consultative Committee (ICC). The ICC represents a diversity of infrastructure interests and includes representatives (both providers and users) from energy, telecommunications, water, rail, ports and airports areas. Operational issues and the specifics of decisions before the ACCC and/or the AER are not the focus of this committee. Rather the focus is on more general issues in the practice of regulation that cross different infrastructure sectors.

The ACCC values the contribution that members of the ICC make to our biannual meetings. It is an important opportunity to sit around the table and discuss, for example, how the global financial crisis is impacting on the provision and use of essential infrastructure services. In addition to this contribution, the ICC has also developed a strong work program.

The attached report is a major piece of research work prepared by the ACCC under the guidance of the ICC. The report focuses on seven different infrastructure areas and compares the regulatory processes and practices of eleven OECD countries distilling insights that can be fed into the continuous process of review and development of Australia's regulatory processes and practices.

Bringing this research work to a culmination has been a major achievement but we also realise that the country-based studies upon which the final report is based will only hold value if they are regularly updated. The ACCC intends to provide the resources to allow this updating to occur. This work undertaken through the ICC has provided the broader regulatory community with an excellent summary report and a major data base of country comparisons. The data base can be used for future work by any regulatory or research group looking to better infrastructure regulation in Australia or in other countries.

Graeme Samuel



## Executive Summary

This report draws together insights for the Australian regulatory regimes of an extensive study into the design, processes and practices of the economic regulation of seven infrastructure industry or sectoral areas in eleven OECD countries and the European Union (EU). For simplicity, these countries and the EU are collectively referred to throughout this report as ‘the benchmark countries’.

The genesis of the project lies with a number of general questions about regulatory design and processes, including:

- Does economic regulation by a body independent of government typically exist in all industries or sectors?
- What role do Ministers play in regulatory arrangements?
- What institutional arrangements for economic regulation are observed across countries, and how have these evolved?
- How do regulatory institutions respond to the assignment of non-economic objectives?
- What is the average time taken for different regulatory matters to be resolved, and what approaches are taken to improving timeliness?
- What alternatives exist to reduce compliance costs in the decision-making process?
- What special arrangements are made for consulting key stakeholders in the regulatory process?
- What information and confidentiality requirements are in place?
- What are the practices with respect to reaching and reporting of regulatory decisions?
- What forms of appeal of regulatory decisions exist?

The focus has been on benchmarking international regulatory design and processes as a necessary step in the continuous process of reviewing the Australian regulatory regime. Sixteen years after the publication of the inquiry into National Competition Policy (the Hilmer report) an economic regulatory structure for Australia’s infrastructure industries is in place, underpinned by a complex and sophisticated set of processes and procedures. From the implementation of the ‘Hilmer blueprint’ until this time, much has been learned from both experience and formal reviews. In response, numerous changes and adjustments have been made to the processes and practices underpinning the regulatory regime. Review, modifications and adjustments are part of a constant cycle, and in the early years of the regulatory regime, it was important to draw heavily upon Australia’s own experience as well as events in other jurisdictions. With a mature system in place, it has become even more important to look to the international experience for new ideas and for examples of successful outcomes and potential pitfalls.

Following the introductory chapter which contains more detail of the project’s scope, chapter 2 presents a review of industry and regulatory structures across benchmark countries on an industry or sector basis. With the focus on design, process and

practice, the report offers insights for future changes and some surprising conclusions about Australia's processes and practices compared to benchmark countries. These insights and conclusions are brought together in chapters three to eight of the report, covering:

- Regulatory design features
- Institutional arrangements
- Consultation, timeliness and decision making
- Involvement of interested parties in the regulatory process
- Information collection, disclosure and confidentiality
- Appeals.

### ***Context, Regulatory Design and Institutions***

The initial objective of the project was to study processes and practices within the discretion of the regulator, rather than policy and regulatory design issues properly within the bailiwick of the Government, and not the province of the regulator. However, while the ultimate focus was on whether international experience suggested any possible improvements to current Australian processes and practices, it became obvious that regulatory design is a key driver of processes and practice and is influenced by a range of geographic, economic, political, legal and cultural factors. Accordingly, a discussion of these influences is included as a necessary aid to understanding how and why other benchmark countries conduct economic regulation of infrastructure.

Some of these relationships and contextual issues are highlighted in this report. For example, in Australia and Canada, telecommunications and postal services to geographically remote regions are often uneconomic to supply at urban prices. Government policy regarding access to services – particularly universal services obligations (USOs) – therefore has significant implications for the regulatory regimes in telecommunications and posts.

However, while regulatory design is strongly context driven (and therefore specific to an individual country) there are also some broad generalisations from the country comparisons that are worth reflecting upon:

- Countries, like Australia, that practice regulation based on a carefully constructed set of regulatory principles generally have a more coherent and consistent approach to regulation than countries that have not followed this path.
- Many regulatory regimes aim to promote consumer interests, with the underlying view that promoting competition and efficiency is the best way to achieve that aim. However, adding additional objectives such as the protection of disadvantaged and low-income consumers, and the abatement of climate change, can create the potential for conflict with the pursuit of competition and efficiency. At minimum, wider and different consultation arrangements have been necessitated by objectives relating to sustainability and renewability of energy – this has occurred in the United Kingdom (UK) for example.
- Regulatory responsibility for economic infrastructure may rest with the national government, sub-national governments or be shared by national and sub-national



governments. This is an important issue in all the federations (Canada, Germany and the United States of America (US)) and for Member States of the EU.

- Regulatory design has often evolved in response to deregulation which generally results in increased private ownership. In particular, as private ownership of economic infrastructure increases, the perceived need for independent regulatory decision making and procedural fairness increases. Similarly, the potential dampening effect of regulation on private infrastructure investment becomes a bigger issue. Thus regulatory regimes applicable to liberalised areas tend to evolve to address such issues. Nevertheless, within a specific regime, there is little evidence of differential treatment of privately owned regulated firms compared with those in government ownership.

With regard to design issues for the specific sectors or industries the following general points can be made:

- Regulatory regimes for energy and telecommunications generally have a high level of transparency and consultativeness, with advanced design features. Telecommunications regulation is subject to ongoing review in many countries.
- The regulatory approach taken with respect to postal services varies greatly across the benchmark countries, with greater variation for this industry than for any other of the six infrastructure areas surveyed.
- Water and wastewater services are typically provided at the local and/or state level, with either quite basic economic regulation or with no economic regulation at all. For broader management, basin-wide approaches have been developed in Japan and the EU.
- Rail has a diversity of institutional arrangements and approaches to promoting competition. There is a growing tendency for rail regulation to be conducted by an independent regulator who also has responsibility for regulation of other transport sectors.
- Airports are often owned and operated by the same authority that regulates the industry – there is not independent economic regulation. More sophisticated regulatory design is observed in the UK and the US.
- The economic regulatory arrangements for ports and port-related services in Australia are amongst the most highly developed in the benchmark countries. The circumstance of some Australian ports as ‘bottlenecks’ for resource exports may explain the greater degree of regulatory attention in Australia.

In addition to the large contextual issues of geography and society, and to specific issues about regulatory design, attention also has to be given to a comparison of institutional arrangements – whether regulation is undertaken by agencies who have multi-sector regulatory responsibilities (and possibly enforce general competition laws) or by industry-specific or sector-specific agencies, and how economic regulation and competition law enforcement are apportioned and co-ordinated between different agencies.

The benchmark countries cover the spectrum, and here the contrast most apparent between Australia and the other benchmark countries is Australia’s level of integration, the one-institution approach. The Australian system was largely purposefully designed and built, primarily flowing from the Hilmer blueprint. Of

course, adjustments have been made since inception, but these modifications – creation of the Australian Energy Regulator (AER) and adding water as an area of regulation – have been made for a specific purpose in response to ongoing reforms. In contrast, the complex American model started from a systematic reform process, but subsequently evolved over time in a less systematic manner, incorporating a range of additions, subtractions, rethinking and restructuring.

The consequences for Australia of the one-institution structure have become more apparent over time, and they are discussed in the report. For example, with such concentration in decision making within the one organisation, a mistake in one area, or a failure to make headway in a difficult area, will potentially have a bigger impact in Australia compared with, say, a set-back for an industry or sectoral regulator in another country, where the consequences are more likely to be confined to that industry or sector. Advantages of the one-institutional approach model – a pro-competitive approach to regulation and a focus on an integrated and consistent approach across different infrastructure areas – have been realised. However, some other consequences have also emerged.

Given this broad background, the following conclusions and insights about the benchmarked processes and practices are offered.

### ***Consultation, Timeliness and Decision-making Processes***

Almost all of the regulatory agencies have requirements to consult in regulatory processes. However, the nature of the consultation process, the time period in which consultation is conducted and the level of involvement of different interested parties vary substantially. Consultation occurs at different stages of the regulatory process through formal or informal mechanisms (or a combination). While the impact on regulatory processes of consultation is difficult to assess, there is some evidence that higher levels of consultation in setting access conditions, for example, have been linked with a reduced incidence of access disputes.

Timeframes for the conduct of regulatory processes appear to vary according to the regulatory application under consideration, the infrastructure area and the jurisdiction. The timeframes for informal processes – such as alternative dispute resolution (ADR) procedures – can vary significantly and are largely in the control of the affected parties. Timeframes for formal processes, such as the setting of access prices also vary and are often not prescribed. However, where indicative timeframes are available in respect of these types of processes, formal processes require between 40 days and six months to complete, depending on the matter. There is little evidence across the benchmark countries of consequences for regulators who fail to meet timelines, although in some of the benchmark countries, regulators are required to state reasons for delays. There is also evidence in some benchmark countries of initiatives being introduced to expedite regulatory processes, including ‘fast-tracking’ the hearing of complaints and the use of pre-lodgement mediation processes.

With regard to decision making, the ultimate determinative body in many of the benchmark countries is a governing commission or board, and in most countries, regulators make decisions independent of government. In only a few of the benchmark countries are the decision-making functions of these determinative bodies delegated. In some cases there can be a number of determinative bodies within the regulator, and in others, sub-groups or committees can be formed to consider a decision prior to a formal determination being made. The majority of regulators make

their decisions publicly available with reasons, although there is some observed variation in the length of publicly available decision documents (and hence the extent to which decisions are publicly explained), possibly reflecting differences in the detail of reasoning. It is now common practice for regulators to issue draft decisions and invite submissions prior to making a final determination.

### *Key Insights Relevant to Australia*

The benchmark study provides some interesting insights into two of Australia's problematic issues – achieving timeliness in regulatory decision making and facilitating commercially negotiated outcomes.

With regard to timeliness, in recent years regulated firms in particular have argued to government that regulatory decisions need to be made more quickly. The time commonly taken to conduct regulatory processes has been reduced from around twelve months to six months. This has been achieved in a range of ways – by changing working practices, by implementing new processes (for example, issuing guidelines on the information that the ACCC and the AER expects a regulated entity to submit with its proposal), and by reducing the scope of regulatory discretion. However, there is a continuing issue as to how to balance timeliness with the other objectives of effectiveness, transparency and consultativeness.

The experiences of other benchmark countries were looked at closely to determine the insights that might be provided for Australia. In relation to timeliness, these include:

- The time taken to conduct a regulatory process is related to factors such as the matter under consideration; requirements to consult; the extent of the involvement of different parties in the process; and, the particular infrastructure area being regulated.
- As a general observation, it appears that formal requirements that a more sophisticated regulatory process be shorter than four months can only be achieved by curtailing consultation and transparency. Where shorter periods are adopted, they appear to be in areas where an effective pre-lodgement process exists (such as Germany), where the matter is relatively simple (e.g. non-price access terms) or where the State retains ownership and control of the regulated company (e.g. France).

In relation to facilitation of commercial negotiations, experiences in benchmark countries suggest there may be additional avenues by which Australian regulators can facilitate such outcomes:

- In the Australian regulatory regimes there is a commitment to achieve commercially negotiated outcomes. Initially the access seeker and access provider must attempt to agree upon terms and conditions, and if access seeker and provider are unable to agree upon terms and conditions, either party must notify a dispute. However in other countries there are higher hurdles to be met before the regulator becomes involved. Alternatively, while this might reduce the timeframe of the regulator's involvement, this pre-lodgement activity might not reduce the overall time taken to achieve an outcome.
- Formal oral hearings are generally regarded as being of less value than written submissions in Australia – other countries appear to take a different approach. In Germany, for example, for non-price energy and telecommunications disputes, parties are encouraged to seek a pre-lodgement mediation. The mediation process

is more streamlined than the formal process, with brief submissions and a decision typically being reached within three weeks. Decisions are non-binding, but there appears to be a high willingness among parties to participate in this pre-lodgement process.

- While Australia's telecommunications-specific access regime allows the ACCC to give directions in relation to negotiations and, if requested by both parties, attend or mediate a negotiation, there is a tendency not to pursue this approach. In contrast, in some countries, different types of mediation processes are offered and ADR can be a formal part of the regulatory process.

### ***Involvement of Interested Parties in the Regulatory Process***

The involvement of end users in some benchmark countries is established or recognised by industry-specific or sector-specific legislation, while in other countries, no specific role is assigned. Where consumer groups representing individual and household users are established by industry-specific or sector-specific legislation, their remit may be prescribed, or may be the subject of formalised agreement between the regulator and the consumer body. Consumer group involvement is typically consultative, although in some cases, consumer groups may have 'standing' to participate in regulatory proceedings. Only a few countries appear to have provisions for public funding of groups representing consumers.

Infrastructure industry bodies are established or recognised by legislation in some benchmark countries, and may have a legislative remit.

Even where certain interested parties do not have statutory rights of participation, such groups may have a general public right of participation or be invited to participate in regulatory processes by the regulator. Outside specific regulatory processes/matters, regulators may also interact with consumer groups, access seekers, industry infrastructure bodies and other interested parties through representative councils and forums.

There is some evidence that some industry forums have been influential in the decision-making process, and that regular interaction between regulators and particular groups may be of particular importance at the early stages of a market liberalisation process. Otherwise the impact of these groups is difficult to assess.

### ***Key Insights Relevant to Australia***

In Australia, there are a number of national bodies representing the diverse interests in the infrastructure industries. However the involvement of these bodies in the regulatory processes varies by industry or sector. In general, the statutory role of representative bodies in the regulatory process is limited. In the energy sector, user and consumer groups are entitled under legislation to make applications to the Australian Competition Tribunal (ACT) for merits review of certain ACCC/AER decisions and a Consumer Advocacy Panel has been established to make grants and commission research to benefit energy consumers. In telecommunications, the extent of involvement of user groups and industry forums has varied over the years. In other infrastructure areas, no specific representative bodies or groups are recognised in legislation.

Given this relatively limited role in Australia, there was interest in the benchmark countries to see where there might be some successful initiatives that Australia could

consider. User advocates within a regulatory agency and industry councils may be initiatives that could be contemplated in Australia:

- Regulators in some benchmark countries have integrated within their agency a user-advocacy unit, charged with representing users, specific categories of users, or the public. Typically these bodies are functionally and financially independent from the regulator. They present an avenue of influence for users beyond their rights to participate in consultation processes. To the extent that the capacity of users and user groups to participate effectively in consultation is limited by time and resources, independent advocates within a regulatory agency may be an option.
- International practice indicates that one way of improving the input of key stakeholders in regulatory decision-making is through the establishment of industry councils comprised of a broad range of interests – such as consumers, wholesale purchasers, infrastructure owners, and employee representatives. However, there are obvious risks and trade-offs to be made – bodies composed of diverse interests may provide for unwieldy processes and unfocused engagement while narrower representations may be at risk of undue influence, or ‘capture’.

### ***Information Collection, Disclosure and Confidentiality***

Regulators typically have a range of statutory information-collection powers. There is a trend observed across benchmark countries for increasing transparency and greater public access to documents used in regulatory decision making, although this trend is more evident in some industries or sectors than others. In some cases, tensions have been identified between the goal of making as much information publicly available as possible while providing that information in a manner that is most useful for stakeholders.

Across countries, the determination of what material submitted by a regulated entity should be excluded from disclosure as commercial-in-confidence (c-i-c) varies. In some cases, this decision is within the discretion of the regulator, and in others, specific administrative practices for receiving and dealing with confidential information have been adopted by regulators. Further, additional exemptions from disclosure exist in some benchmark countries, especially where it may materially affect the interests of a third party.

In a number of benchmark countries a ‘public interest’ type determination may outweigh a claim for c-i-c or other claims against disclosure, although what constitutes the ‘public interest’ has been interpreted differently across benchmark countries.

Annual or ongoing information-provision obligations exist in a number of benchmark countries and may reflect the surveillance remit of a regulator, or may be required on the basis of particular regulatory arrangements. The timely provision of information by regulated entities was identified as an issue, in particular because of the incentives that incumbents may have to delay determinations on access matters.

Various initiatives were identified in relation to storage of, and access to, the confidential information received by regulators. These include the use of information security policies, and the establishment of formal procedures relating to access to computer models used as part of a regulatory proceeding.

### *Key Insights Relevant to Australia*

Australian regulators have a range of information-collection powers necessary to perform their duties and enforce relevant laws, including powers to obtain access to premises, compel the production of documents and require the collection and provision of specified information on an annual basis. The treatment of confidential information differs by industry or sector and by regulatory process.

The practices of Australian regulators in relation to disclosure of information accord closely with trends for transparent regulatory processes. This trend has been criticised in some benchmark countries for resulting in an unduly large number of documents being published, and creating, it is argued, a continuing burden for regulated entities and other stakeholders to ‘keep up’ with the regulator.

However, while Australia shares much in common with the other benchmark countries, there are important differences in detail worth highlighting:

- The ongoing requirements for entities in regulated infrastructure areas to provide market-specific information to the regulator for the purposes of market monitoring or surveillance appear to be significantly greater in some benchmark countries than they currently are in Australia.
- While the ACCC and the AER do place some continuing information requirements on some infrastructure providers in specific infrastructure areas, the information collection and disclosure requirements are either similar to, or less demanding than, those in the international jurisdictions surveyed.
- The amount of information the ACCC/AER collects from a regulated entity is influenced, in part, by the merits review process, where the review is limited to the information originally submitted to the regulator. This is not the case in some benchmark countries, where the appellate entity is not restricted in undertaking a merits review to the material before the initial decision maker, but rather has ‘full investigative rights’.
- Australian arrangements appear to differ from those in benchmark countries which have established ‘internal’ review processes where separate teams are established within the regulatory agency to undertake a substantive review of the initial decision. In such circumstances, the review team has broad powers, including the power to conduct public hearings. Again, these practices would tend to indicate that the information-collection requirements for the purposes of review of a regulatory decision appear to be potentially greater in some of the benchmark countries.
- The breadth of empowering provisions also appears relevant to the information collection process. In Australia, information provision obligations can be imposed by regulatory information order (with specific items detailed) or in accordance with specific legislative provisions in relation to particular regulatory processes. By comparison, regulators in some of the benchmark countries appear to have broader rights of access to information.
- In Australia information provided voluntarily for which a claim of confidentiality is not accepted by the ACCC must be returned to the provider, and the ACCC must not have regard to it. If the claim of confidentiality is accepted, the ACCC may give lower weight to the information because it is untested. Principles

governing the treatment of information provided to a regulator voluntarily were identified only in Ireland.

- In Australia, the ACCC has issued principles as to how it will determine whether to publish c-i-c information. Practices include providing opportunities for merits review of such decisions, providing opportunities to retract confidential information provided voluntarily, and publishing principles in relation to how the public interest test will be applied. The only practice identified which appeared to provide additional protection for those affected by disclosure was in Ireland. The practice of Australian regulators in making determinations regarding publication of c-i-c material demonstrates high levels of procedural fairness relative to many of the benchmark countries examined.
- The exemptions to disclosure, including exemptions for confidential commercial information, in Australia appear to be similar and consistent in scope to exemptions in most other benchmark countries.

#### *Further Insights Relevant to Australia*

The issue of how best to facilitate the timely provision of information was common to almost all benchmark countries. A number of 'incentives' are used:

- Fines (which appear to be imposed infrequently in practice)
- Basing a decision only on information provided at a particular point in time, or
- Automatically finding in a complainant's favour if a response to an information request is not received by a specific date.

It is clear from the review that storage and access issues have arisen in a number of benchmark countries, and that matters such as how to store confidential information securely and issues relating to how best to provide access to models used in regulatory processes are common to a number of regulatory agencies. A number of initiatives to address storage and access issues have been identified:

- Some regulatory agencies are seeking to improve transparency in information collection procedures through the publication of operational protocols that set out their methods of operation in relation to such matters as: company visits; accessibility and the submission of documents; and for inspecting and copying digital data.
- Other regulatory agencies have developed and introduced formal information-security policies, including creating secure electronic evidence environments and upgrading document management systems.
- In order to provide timely and appropriate access to computer models or simulations employed as part of regulatory proceedings, some regulators have introduced formal access procedures. These include requirements regarding the type of supporting information that must be provided with the model; requirements that any modifications to the model be provided to all parties who have been granted access to the models; and, finally, that the model be made available on a timely and reasonable basis for the purpose of the proceedings.

## *Appeals*

An appeals process is generally regarded as an important part of the regulatory process with two basic forms of appeals:

- a determination of the legality of a regulatory decision
- a review of a regulatory decision on its merits.

While the type of appeal mechanism varies widely, appeal arrangements seem to be driven by two key factors:

- The country's model of government. In countries where there is less separation of judicial power, there is no dominating model of review. In contrast, where there is a high separation of judicial power, merits review is usually available as an intermediate step in which appeals go to an executive body (such as the ACT in Australia).
- The extent to which an industry or sector is privatised and open to competition, particularly where investors operate multi-nationally. Liberalisation and privatisation is usually accompanied by extensive regulation. The profitability for investors depends upon the terms and conditions of access. Arguably, unless a government has made a credible commitment to the regime, including allowing review of regulatory decisions, private investment may be deterred.

In Australia, the right to merits review was not widespread until the 1970s. Since then, significant changes have occurred culminating more recently in a concern about the time taken for such reviews. The Australian governments agreed in 2006 that where merits review of regulatory decisions is available, the review will be limited to the information submitted to the regulator. In 2007, this was revised to allow the review body to admit new information in limited circumstances.

### *Key Insights Relevant to Australia*

Taking into account the influence of Australia's model of government, there are some aspects of international practice that are of relevance to Australia:

- The Australian governments reaffirmed in 2006 that, in the first instance, terms and conditions for access to infrastructure services should be commercially agreed between the access seeker and infrastructure operator. This raises an issue as to the appropriate role of ADR in a merits or judicial review of a regulatory decision. There are several variants of this approach in operation across the benchmark countries which are outlined in detail in the report.
- The tension between timely processes and providing opportunities for merits review has been recognised and the compromise has been to limit the grounds of merits review, restrict the information before the appeal body, and impose time limits. However, as parties must ensure that for every issue that could conceivably arise in a review, all the material is before the ACCC/AER this can lengthen the process. Problems of protracted reviews are not unique to Australia – observing the benchmark countries it appears that most appeal processes take around 12 months.
- Traditionally, in Australia, the right to apply for judicial review of a decision is restricted to a person who is adversely affected by the decision. However, the gas and electricity regimes were amended expressly to provide for intervention by



user and consumer groups in Tribunal proceedings – the example of the UK experience can be drawn on here.

### ***Conclusion***

The groundwork has been done to situate Australia's regulatory design, processes and practices within an international context and a number of insights about future processes and practice for Australia have been highlighted. However, to be useful, this work must be kept updated. It is also clear that this ambitious project has just begun, for what has also emerged from this study is a number of new directions for further work including the potential for extension to other countries and the more detailed exploration of specific issues such as the trade-off between consultation and timeliness in reaching decisions.



# 1. Introduction

In 1991, the Australian Commonwealth, States and Territories reached agreement on the need for a national competition policy (NCP). The first step in this process was the establishment of an Independent Committee of Inquiry, chaired by Professor Hilmer, to undertake an inquiry into NCP.<sup>1</sup> The inquiry faced a number of critical questions. What type of regulatory regime was required to fulfil the policy objective of improving the efficiency of Australia's public utilities and more generally of Australian industry? What type of regulatory institutions would be required to administer these reforms?

Now sixteen years since the publication of the Hilmer blueprint, a regulatory structure underpinned by complex and sophisticated sets of processes and procedures is in place. Over these sixteen years much has been learnt both from experience and from the formal reviews of the structure that have been conducted. In response, changes and adjustments have been made to a number of the processes and practices underpinning the regulatory structure.

It has also become clear that review and modifications/adjustments are part of a constant cycle. In the early years of the NCP it was important to draw heavily upon what was learnt from Australia's own experience and practice. With a mature system in place it has now become increasingly important to look elsewhere – to look to the international experience for new ideas and to learn from this experience.

## ***Rationale and Project Methodology***

The aims of this current project are ambitious. The project aims to achieve a greater overall understanding of the practice of the economic regulation of infrastructure, and the extent to which this practice is contextualised by the specific institutional, legal and market structures in which regulators operate. This has been a major task not only in terms of acquiring the necessary detailed and current (up-to-date) material but in absorbing it in such a way that significant lessons and experiences of other international regulators can be distilled. Ultimately the aim is for this material to inform and potentially improve the regulatory practice of the ACCC and the AER.

However, more modestly, it has also been important to provide readable descriptive overviews of the regulatory practices and processes of different countries. Such overviews do not occur elsewhere, so by providing them in this work it is hoped that a larger readership can become involved and perhaps take up the habit of thinking about the processes and practices of other countries (be it Germany, the Netherlands or the UK) before settling upon a solution to some practice or process issue in Australia.

In this work, comparisons are made between the current processes and practices across a representative sample of OECD countries. While principles of best-practice regulation tend to be widely agreed upon, the complex issue is about determining where trade-offs will be made. Thus the focus has been on the different approaches to finding a balance between the competing interests of the regulatory process – for example, timeliness, transparency of information, the consultative process, and overall effectiveness. Understanding why there are different approaches to these trade-offs is a theme of this study. What has become clear is that the regulatory structure of different countries (which includes practices and processes) are a product

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<sup>1</sup> The terms of reference are set out in: Australian Independent Committee of Inquiry, *National Competition Policy* (Report, AGPS, Canberra, 1993) (Hilmer Report) Annex A.

of the history, geography, politics, economics and, of course, the cultures of the different countries.

Attention is also paid to the role of internal and external economic experts in each regulatory agency, the role of industry and consumer bodies in the regulatory process, and the legal ramifications of regulatory decisions made.

The review does not consider broad issues of regulatory policy (such as funding of regulatory institutions) or the specific regulatory tools used by agencies, such as their pricing methodologies; approach to the weighted average cost of capital (WACC) or methodologies for defining and measuring subsidies. Neither is it an explicit aim of this review to evaluate the effectiveness of different approaches to economic regulation. Rather, it focuses on the processes used in the economic regulation of key infrastructure industries.

The parameters of the projects, the definitions and explanations of countries and industries covered, are set-out below.

### ***What is meant by ‘Economic Regulation’?***

‘Economic regulation’ is broadly the process of government intervention aimed at improving economic efficiency in certain industries and sectors. The focus of economic regulation is on government interventions in market decisions and outcomes, such as price, rate of return, output, market entry or exit, and competition. The industries subject to economic regulation are typically network-based – such as electricity, gas, telecommunications, rail and post – which display natural monopoly characteristics.

Specifically the project is interested in:

- Regulation of some or all of the retail prices of a vertically integrated infrastructure provider, including through price-cap and interventions associated with universal service obligations (USO) and community service obligations requirements.
- Quality of service monitoring, particularly where price regulation occurs, so as to establish that reduced prices for retail or wholesale services are not being achieved by reducing quality.
- Regulation of the rate of return allowed to be realised by an infrastructure provider, including requirements to achieve only ‘cost recovery’.
- Determination of whether particular components of the production chain should be subject to (regulated) access by others, including competitors – variously called ‘declaration’, ‘designation’ or ‘coverage’.
- Control or other influence on the price and non-price conditions of access to infrastructure, including quality of service monitoring.
- Approval procedures for the deployment of new capacity or for capacity enhancements.
- Restrictions or prohibitions on businesses that an infrastructure provider can deal with (included related businesses) or activities that it can engage in, including prohibitions on cross-subsidisation of activities, divestiture requirements and orders requiring a company to undergo structural or operational separation.

Other forms of regulation, such as social and environmental protection, are not considered to be ‘economic regulation’, even though they usually will have economic implications.

### ***Which Industries are Covered?***

The industry and sectoral areas covered in this report are the key ‘utility’ or ‘infrastructure’ industries that are, first, of greatest importance to the Australian national infrastructure, and, second, those regulated by the ACCC and the AER. In order of treatment these are:

- Energy (electricity and gas)
- Telecommunications
- Posts
- Water and wastewater
- Rail
- Airports
- Ports and harbours.

The convention used is to describe an area like electricity or rail as an ‘industry’, and a combination of similar areas as a ‘sector’. For example, electricity and gas together are described as the ‘energy sector’ and the combination of rail, road, airports and ports is called the ‘transport sector’. The word ‘sector’ is sometimes also used in a more generic sense, as in ‘private sector’ and ‘public sector’, again reflecting broader divisions for the word ‘sector’.

### ***Country Selection***

The countries covered were chosen in consultation with the Advisory Committee to reflect a variety of legal, institutional and geographical features that may shape the regulatory environment. All countries chosen are members of the OECD as it is these countries that – like Australia – possess highly developed economic infrastructure and mature regulatory institutions; and have similar levels of gross domestic product (GDP) per capita. The countries selected include those from the full range of sizes from the three very largest OECD economies (the US, Japan and Germany), through to medium-sized economies like Canada and ranging down to two of the smallest in the OECD (New Zealand and Ireland). Countries are selected from all of the continents having OECD members (Africa and South America have no OECD members) including one of the three Asian members of the OECD – Japan. The majority of countries are from Europe, and as those countries are also members of the European Union (EU), the regulatory approach and influence of the EU is also surveyed. The countries considered are grouped and discussed in the following order:

- Asia: Japan
- Australasia: Australia and New Zealand
- Europe: European Union, France, Germany, Ireland, Netherlands, Sweden and United Kingdom
- North America: Canada and United States of America.

### *A Caveat – Dealing with Change*

In his speech celebrating the seventy-fifth anniversary of the Federal Communications Commission (FCC), acting Chairman Michael Copps, posed the following question:

How do we take this 75 year old agency, charged with implementing our formative communications law, and make sure it is up to the challenges of the 21<sup>st</sup> century? Born in the world of primitive radio sets, raised on plain old telephone service, now trying to manage high-speed broadband and orbiting satellites, can we make it an agency for all seasons?

In fact, of course, changes and updates are already occurring across the regulatory landscape. Since this research began there have been many changes to the economic, legal and political environment in which infrastructure operates across the benchmark countries. For example, nearly the entire OECD has moved into recession; the international price of crude oil has at first risen to record heights only to fall to the lowest level for years; a number of countries have changed government, and several have made substantial changes to the arrangements for the economic regulation of infrastructure. This means that just as chapters in the country-based research have been ‘finished’ the need for revisions has become evident. While procedures have been put in place to keep up with changes, inevitably there will be things that are ‘out of date’ immediately upon release.

## 2. Overview – Industry and Regulatory Structures across Benchmark Countries

Across benchmark countries, the infrastructure and regulatory landscape differs markedly and has changed substantially over time, particularly the last two decades. This chapter provides an overview of the industry structure and the regulatory regimes in the eleven benchmark countries on industry or sector basis. It concludes with a discussion of themes and similarities and differences across industries and across countries.

### *Energy*

In most of the benchmark countries energy has traditionally been supplied by vertically integrated, typically government-owned, regional monopolies. There is, however, a consistent theme of liberalisation in the energy sector that has, among other things, altered industrial structures and the ownership mix. Nevertheless, liberalisation has followed different timetables and has had varying degrees of success in stimulating competition. The extent to which competition has been introduced to the vertical layers of the energy sector (generation, transmission, distribution and retail) also varies across benchmark countries, and these differences influence the scope and nature of the different energy regulatory regimes.

The Australian, Canadian, French, German, Japanese, Irish and UK energy sectors were traditionally supplied by regional, typically vertically-integrated monopolists. In contrast, the traditional structure of the energy sectors in Sweden and the Netherlands is oligopolistic, rather than monopolistic. For instance, prior to market reforms in 1998, there were four main electricity generators in the Netherlands operating a ‘centralised market’ that involved co-operation through an organisation jointly owned by the generators – the so-called SEP. Although SEP has since been dissolved, a few generators still dominate the Dutch electricity market. Similarly, the Swedish electricity market has traditionally been dominated by a small number of generators even after the formation of a wholesale market with Norway, Denmark and Finland.

Competition has been introduced in the energy markets in each of the benchmark countries although there are still restrictions in some instances. For example, although the Irish energy markets are open to competition, suppliers who wish to build new infrastructure must be authorised to do so. It also appears that competition to supply smaller customers in Japanese energy markets remains limited. The degree of competition realised varies across countries. In several benchmark countries, the incumbent remains dominant – for example in the UK (transmission), France, and Ireland. The Canadian and US gas sectors are fully integrated in the North American gas market.

In some benchmark countries, liberalisation has been facilitated by separation of the vertical layers of the energy sector. For example:

- All of the European benchmark countries are members of the EU and, as such, are subject to EU Directives and Regulations. Member States have been directed under Directive 2003/54/EC legally to separate distribution and transmission operations. A subsequent draft proposal (the so-called ‘third package of energy reforms’) mandated the ownership separation of production and supply from transmission however this met with opposition and the revised draft of the proposal after the second reading of EU Parliament on 24 April 2009 permits

some forms of vertical integration under strict rules. Vertical separation has occurred to varying degrees across the benchmark countries. Currently, for instance, in Germany some energy companies remain vertically integrated and there are varying degrees of government ownership. In France, the incumbent EDF has separated its distribution and transmission functions into separate subsidiaries, but retains ultimate control over those segments and remains dominant in both gas and electricity markets. Although the Irish energy incumbents have been vertically separated, the incumbents in both gas and electricity have remained in government ownership.

- The creation of the Australian national electricity market (NEM) in 1996 provided for the separation of electricity transmission and distribution networks from generation and retail businesses. Similarly, the national gas regime put in place in 1997 required the separation of gas transmission and distribution networks from production and retail segments.
- In Japan, energy suppliers do not have to separate vertically but are subject to a form of accounting separation. Furthermore, although the New Zealand *Industry Reform Act* required full separation of lines and supply businesses, the regulator can grant exemptions and there remains a high degree of vertical integration between generation and retail.

The liberalisation of energy markets has necessitated regulatory arrangements to facilitate third-party access to natural monopoly transmission grids and to regulate natural monopoly elements. These arrangements may include price controls, mechanisms to resolve access disputes and monitoring compliance with access arrangements. The general aim of most of the regulatory regimes is to promote competition in contestable elements in the interests of consumers. In the UK, however, the water and energy regulators also have a general duty to have regard to any guidance from the Secretary of State regarding the regulator's contribution to the attainment of the government's social or environmental policies. This general duty ostensibly creates the potential for conflict with the objective of promoting competition.

In most cases, the energy regulatory regimes are set out in legislation or in rules determined by independent bodies. For example, in Australia, the National Electricity Rules (initially approved by the Ministerial Council on Energy (MCE), and amended by the Australian Energy Market Commission) prescribes many of the details of the electricity network regime administered by the regulator (the AER). In the US, however, the Federal Energy Regulatory Commission (FERC) has greater responsibility to determine the details of the energy regime. For instance, the regulatory arrangements for third-party access to transmission networks are detailed in its landmark Orders 888, 889 and 890.

The energy regulator performs a determinative role in relation to access prices in all benchmark countries except France – the French regulator has only a recommendatory role to the government in relation to energy prices. The form of price regulation in the energy sector varies across benchmark countries:



- In several benchmark countries access price regulation is applied asymmetrically.<sup>2</sup> For instance, the Australian energy regulatory framework broadly applies to two categories of services – those that are subject to capping *ex ante* of maximum revenue and/or price for at least five years as well as a dispute resolution mechanism; and those that are only subject to a dispute resolution mechanism but not *ex ante* price regulation. In New Zealand, businesses that breach thresholds set by the regulator (the Commerce Commission (NZCC) in this instance) may be subject to price control under the general competition law but are otherwise free to determine their own access prices. The New Zealand regime also allows administrative settlements as an alternative to control. In both Australia and New Zealand, regulated operators who are not subject to *ex ante* price regulation must set their prices in compliance with rules established under the regulatory regime. Canada also applies asymmetric price regulation based on the public interest in a company's operations. Smaller operators are only subject to price regulation on a complaints basis whereby the regulator only intervenes in the event of a complaint being filed with it. Larger Canadian operators are subject to price regulation.
- Where relevant, in Australia, Germany, Ireland, the Netherlands, the UK, Canada and the US, energy access prices are regulated by *ex ante* price methods that apply for a set period. In Japan and Sweden, however, access prices are subject to an *ex post* approval process.
- The benchmark countries that apply *ex ante* price regulation use both building block and CPI – X methods to determine price caps.<sup>3</sup> For instance, Ireland and Canada use a building block approach to determine prices. In contrast, the UK regulator caps energy prices using a RPI – X price cap on maximum revenue.

Consistent with Australian regulatory practice, some of the benchmark countries combine price regulation with quality of service and market monitoring to ensure compliance with the regulatory regime. Some regulators also undertake market investigations. For instance, the German regulator may conduct *ex officio* investigations that generally concern larger structural issues that affect all network participants.

All of the benchmark countries adopt a regulatory framework where non-price conditions of access are largely determined by negotiation between the access seeker and access provider. However mechanisms generally exist to ensure that access is provided on a non-discriminatory basis and on 'fair and reasonable' terms. For example, in New Zealand, the Electricity Commission is required to develop a benchmark Transmission Agreement that provides an appropriate structure for the development of access agreements. In France, access is facilitated by production of a model contract by the regulator which forms the basis of negotiation of access terms. Similarly, in the US, a *pro forma* access tariff sets out the details of the minimum

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<sup>2</sup> Asymmetric regulation refers to the practice of applying regulatory restrictions exclusively or differentially to one group of companies rather than to all competitors in the market.

<sup>3</sup> Price cap regulation specifies the maximum rate of change in the regulated prices over a specific regulatory period (typically four or five years). Under the CPI – X method, regulated prices are set to increase at a rate equal to the rate of change in the consumer price index (CPI) minus a productivity offset factor (X). Under the building block model, various components of costs including operating costs, taxation, as well as a reasonable return on capital and of capital, are added up to form future costs of an efficient service provider. The path of regulated prices is set in such a way that maximum allowed revenues are equal to the projected future costs at the present value.

non-price terms and conditions required to provide non-discriminatory access. Some benchmark countries, for example Ireland, facilitate access agreements by publishing guidelines.

Where agreement regarding third-party access cannot be reached, each of the regulatory regimes provides a dispute resolution mechanism. This role is generally performed by the regulator. However, in New Zealand, the Rulings Panel was specifically set up to deal with dispute resolution and enforcement of the Electricity Rules and Regulations. Similarly, in France, access disputes are dealt with by a separate standing committee of the regulator.

### *Telecommunications*

Other than in Canada and the US, nation-wide telecommunications services have traditionally been supplied by government-owned statutory monopolies. In contrast, Canada was traditionally supplied by six regional monopolists, while telecommunications in the US was traditionally supplied by a private regional monopoly 'Bell system' (local operating companies) controlled by American Telephone and Telegraph Company (AT&T).

Statutory monopolies in telecommunications have been abolished in all benchmark countries and a degree of competition has subsequently emerged. For some European countries, it appears that this liberalisation has been necessitated by EU Telecommunications Directives.

The incidence of private ownership has increased. While the incumbents in the US and Canada have traditionally been privately owned, those in other benchmark countries have typically been government-owned. Since liberalisation, many previously government-owned incumbents, including those in the UK, Germany and New Zealand, have been fully privatised, while those in Japan and France have been partially privatised.

In most benchmark countries, telecommunications incumbents remain vertically integrated, but operational separation has occurred in a number of countries. For example, in the UK the privatised incumbent, British Telecom, has been separated operationally into one company providing fixed-line connectivity and another providing content and other value added services. In Australia, the incumbent, Telstra, remains both horizontally and vertically integrated, but is subject to a relatively weak form of operational separation (which is implemented as a statutory condition of Telstra's carrier licence).<sup>4</sup> While no benchmark country has imposed full structural separation on its incumbents, Ireland is considering this as a remedy to Eircom's market power.

In contrast, the US telecommunications market has been subject to functional, rather than vertical separation. Following an antitrust case, in 1982, AT&T reached a settlement with the US Department of Justice whereby AT&T would divest its local operating companies. These companies were subsequently split into seven independent Regional Bell Operating Companies (RBOCs). Each RBOC provided telecommunications services within a designated local access transport area with AT&T restricted to providing long-distance services. The RBOCs have subsequently merged to form the current three major regional companies in the US – AT&T,

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<sup>4</sup> Telstra is horizontally integrated as it operates in related business areas in fixed-line and mobile telecommunications, internet, and pay-TV.

Verizon and Qwest. This unique industry structure required a unique regulatory solution in order to introduce national competition to regional monopolies that were subject to State rather than Federal jurisdictions. The Federal Communications Commission (FCC) had no direct authority to enforce the *Telecommunications Act* at the local level, and thus could not compel the local exchanges to open their markets to competition. In order to facilitate opening, the *Telecommunications Act* was structured to provide incentives to the local exchange carriers to liberalise their markets. The FCC would not authorise entry of the local exchange carriers into the long-distance market unless the local incumbent has opened its own market for regional services to competition. To determine whether a local exchange carrier had opened its market to competition, the FCC developed a checklist that had to be verified by the state regulator.

In each of the benchmark countries, the telecommunications industry is subject to economy-wide competition law. Australia appears to be unique in also having an industry-specific competition law set out in Part XIB of the *Trade Practices Act*. Among other things, Part XIB provides the ACCC with additional enforcement powers enabling a rapid response to anti-competitive conduct in the telecommunications industry, under the so-called ‘competition rule’.<sup>5</sup> The ACCC is able to issue a competition notice in response to a breach of the competition rule. A competition notice calls on the recipient to cease the allegedly anti-competitive conduct or else face the prospect of proceedings for pecuniary penalties and/or damages. Part XIB also allows the ACCC to issue tariff filing directions to certain carriers and carriage service providers and to 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.

Each of the benchmark countries has an industry-specific telecommunications access regime. The access regimes of the European benchmark countries are strongly influenced by the relevant EU Directives which have generally been transposed into national law in those countries. Of particular note is the requirement to establish a general authorisation for all types of electronic communication services and networks rather than systems whereby individual licences are provided to network and service providers. In particular, the *Authorisation Directive* has abolished the system under which Member States issued individual licences to network and service providers as a means of regulating communications. The Directive requires Member States to establish a general authorisation for all types of electronic communication services and networks, including fixed and mobile networks and services; data and voice services; and broadcasting transmission networks and services. The Directive limits the type of conditions which may be included in general authorisations. This is to ensure service providers are treated in a non-discriminatory, objective, transparent and proportionate fashion by national regulatory authorities. It also requires Member States to encourage the use of standards as a means of ensuring interoperability of service.

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<sup>5</sup> Anti-competitive conduct is defined more broadly in Part XIB of the *Trade Practices Act* than in the general competition provisions of Part IV. In particular, the industry specific regime provides for a ‘competition effects’ test in relation to misuse of market power rather than the ‘purpose’ test underlying the general misuse of market power provision in Part IV.

In some regulatory regimes, regulation is applied asymmetrically. For example, under the *EU Access Directive*, access obligations in Member States should only be imposed on operators that are found to have significant power in a market following a market analysis. If a competition problem is identified in relation to third-party access, available remedies include obligations related to cost-recovery, price controls and accounting separation, as well as obligations of transparency, non-discrimination and good faith in negotiating access.

A similar regime is implemented in Japan whereby only a dominant carrier of specified services is subject to regulation. In contrast, in Australia, Canada, the US and New Zealand, regulation regimes applies to all providers of certain services – known as ‘declared’ services in Australia and ‘designated’ or ‘specified’ services in New Zealand. In New Zealand, however, the regulatory obligations on suppliers of ‘designated’ services are different from those on suppliers of ‘specified’ services. Both groups are subject to determination of non-price conditions of supply if agreement with an access seeker cannot be reached. However, price conditions can only be determined for designated services, not specified services.

Price regulation is generally applied at the wholesale level. However, in Germany the regulator has a role in approving retail tariffs for carriers with significant market power. In Australia, in addition to regulation of wholesale services, there is a range of ‘consumer safeguards’ applied to end-user services. These include universal service obligations (USOs), access to untimed local calls and retail price controls on Telstra. In Australia and in Ireland, the regulator monitors, but does not set, retail prices.

The regulatory regimes of several benchmark countries facilitate commercial negotiation of access prices in preference to determination by the regulator. The Australian regime, for example, provides for the ACCC to determine pricing principles at the time a service is declared and to issue model terms and conditions for certain ‘core services’. In New Zealand, the NZCC is able to make a ‘standard terms’ determination on which a designated access or specified service must be supplied. In the Netherlands, the regulator publishes a ‘market analysis decision’ in which it sets out its broad approach to pricing and non-price access issues for a range of regulated services. This approach specifically addressed the perceived problem of a high number of individual access disputes appearing before the regulator.

All of the telecommunications regulatory regimes provide for dispute resolution where commercial negotiations about access conditions fail. Generally, this role is undertaken by the national regulator. In the US, however, state regulators arbitrate disputes. To facilitate a consistent approach to pricing by state regulators, the FCC has established national pricing principles. Furthermore, in Japan, the Telecommunications Business Dispute Settlement Commission (TBDSC) has been set up specifically to deal with dispute resolution in telecommunications. The TBDSC offers an alternative channel to the ministerial ordinances for consultation or award for dispute settlement.

As well as a focus on promoting competition, several of the telecommunications regulatory regimes in benchmark countries have explicit roles in regulating USOs. For example, under the Japanese regime, a carrier with USOs must notify the regulator about new and changed tariffs for universal services at least seven days prior to application. The regulator may order changes to those tariffs within a reasonable time. The EU Directives also establish a minimum level of availability and affordability of basic communications services. The Canadian legislation places

particular emphasis on USO and affordability given its large land mass and low population density.

### **Posts**

Postal services in all the benchmark countries were traditionally supplied by state-owned statutory monopolies. In some instances, postal services were also bundled with one or more of telecommunications, banking and insurance (e.g. Australia with telecommunications; Germany with telecommunications and banking and Japan with banking and insurance). Today, postal services in the benchmark countries are provided by a variety of industrial arrangements and with various degrees of competition. In some countries, national postal operators have been privatised (e.g. Germany and the Netherlands) or are in transition to private ownership (Japan). In countries such as Australia, Canada, France, Ireland, Sweden, the UK and New Zealand, the national postal operators are corporatised, but remain under state ownership. However, the New Zealand incumbent has expanded into the private sector through a portfolio of joint ventures and acquisitions. The US incumbent – USPS – remains an executive branch of the government.

The stage of postal market liberalisation differs across the benchmark countries. Sweden and New Zealand have long opened their postal markets to full competition. In recent times, the UK and German postal markets have also been fully opened up. In other countries, competition has been progressively introduced, with incumbent operators retaining a monopoly over certain services (often called ‘reserved services’) in exchange for providing specified universal services. Examples include Australia and the Netherlands that first introduced competition in the non-reserved service in the early 1980s, while their respective incumbents still retain the exclusive right to deliver certain reserved services.

The extent to which competition has arisen also varies in benchmark countries. In Japan, no entry into the general correspondence delivery business has occurred because of the stringent entry requirements. Competition in upstream services or end-to-end services has occurred in other countries, but the incumbents maintain their dominant positions in the letter market. Competition has emerged in the US where large private operators have gained substantial market share in the delivery of priority mail, express mail, bulk parcel post and bulk international mail.

Despite the differences in market development, the primary regulatory objective in many benchmark countries is to ensure provision of a universal postal service. Nevertheless, there is less consistency in other regulatory objectives (such as to promote competition) across the benchmark countries. As a result, there is considerable diversity in the regulatory frameworks that are applied to postal services.

Under the third EU Postal Directive adopted in February 2008, Member States are required to open up their markets fully as of 31 December 2010 with a further two-year transition period for eleven Member States. From that date there will be no further reserved services.

The combination of exclusive rights and USOs (the so-called ‘postal concession’ in the Netherlands) is often accompanied by price and quality of services regulation. Most of the benchmark countries have regulated prices for some core services defined by reserved services or universal services. Australia Post, for example, is subject to *ex ante* price regulation of reserved services under the generic prices-surveillance provisions of the *Trade Practices Act*. Similarly, in the Netherlands and France, the

respective regulator is authorised to approve changes in prices for universal services. In Ireland, the regulator must approve any increases in charges for reserved services. In Japan, the regulator is responsible for approving changes in postage rates for third and fourth class mail.

Some countries such as the US and the UK apply price cap regulation to some areas of postal services where competition is weak. At the other extreme, Canada Post is able to set its own rates for all services, providing those rates are fair and reasonable and cost-based.

In New Zealand, the incumbent has entered into a Deed of Understanding with the Crown in which it agrees to maintain service standards for the basic letter post and a specified number of postal outlets. The incumbent in the UK is subject to prescribed quality of service standards while quality of service is monitored in France and Ireland,

In addition to regulation of price and quality of services, other regulatory measures may be adopted. For instance, Australia Post is required to keep records and provide these to the regulator in performing regulatory functions, such as monitoring cross-subsidies between reserved and non-reserved services. In the Netherlands, various regulatory conditions are imposed on the incumbent concession holder. These include conditions on service provision, tariffs, cost and revenue accounting, financial administration and reporting.

Most benchmark countries have an access regime in place in order to enhance the ability of competitors to access the postal network. In New Zealand, for example, the incumbent must provide access to its postal network to competitors on non-discriminatory terms and conditions while in Australia, Australia Post must provide access to a 'bulk interconnection service'. Some EU countries such as France, the UK and Germany adopt a dispute resolution mechanism, under which the regulators intervene *ex post* when negotiation over access arrangements fails. Under the US access regime imposed on 'worksharing activities',<sup>6</sup> workshare discounts can be determined either *ex ante* as part of a rate-setting agreement, or *ex post* upon receipt of a complaint. In contrast, the Irish system permits competition for supply of non-reserved services without an access regime in place.

Entry into contestable postal network segments is still restricted in some benchmark countries where some forms of authorisation by the regulator are in place. For example, Japan has a 'permission' system for new operators to enter into either general or special correspondence delivery. The incumbent also needs permission to enter new business areas and the regulator must explicitly consider the impact of such entry on private-sector competitors. Similarly, although any postal operator can compete in non-reserved sectors in Ireland, large competitors (those with turnover greater than €0.5 million) need to be authorised by the regulator. Entry is subject to licensing requirements in France, Germany, Sweden, the Netherlands and the UK; however, there do not seem to be restrictions on the number of licences that can be issued.

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<sup>6</sup> These activities generally involve private-sector mail service providers or mailers preparing, barcoding, presorting or transporting minimum volumes of mail to qualify for reduced postage rates. Workshare discounts potentially apply to all mail services and products.

## ***Water and Wastewater***

Unlike other infrastructure areas, local governments often have a key role in the provision of water and wastewater infrastructure and services – for example in Germany, France, Ireland, the Netherlands, Sweden, Japan and New Zealand. In England and Wales, however, the water and sewerage industry was privatised in 1989, and in the US water infrastructure is owned by both the public and private sector. In keeping with EU Directives, France uses a decentralised model under which the country is divided into six large river basin districts (RBD) each of which is managed by a local water parliament comprised of representatives of all stakeholders.

There is very little competition in water and wastewater in any of the benchmark countries, with many services being supplied by regional monopolies. Where competition exists, it is often limited. For example, in the UK, competition is generally restricted to servicing eligible large-business customers, although competition to supply all non-residential customers was introduced in Scotland in April 2008.

In the majority of benchmark countries, regulation of water and wastewater services is the responsibility of sub-national governments. This regulation usually focuses on service quality and availability, and pollution control. The 2000 EU Water Framework Directive established a framework for member states in water policy, with a focus on the quality of drinking water. It requires a member state to develop RBD plans for water management. It also establishes a users pay pricing principle, under which charges should reflect the full costs of the resources (including operational and environmental costs). While the implementation of this Directive is still continuing, so far there is no evidence of any compliance issues with any benchmark EU countries. However, domestic water use is not charged in Ireland.

In Australia, the states and territories regulate all urban water and wastewater and rural water outside the Murray-Darling Basin (MDB) under state legislation. As an example of this regulation, the Victorian Essential Services Commission (ESC) regulates the prices and service standards of 20 businesses supplying water, sewerage and related services to residential, industrial and commercial, and irrigation customers throughout Victoria. In relation to water regulation, the ESC must, among other things, ensure that regulatory decisions have regard to health, safety, environmental sustainability (including water conservation) and social obligations of regulated entities.

In the UK, the Ofwat is the industry-specific regulator governing regions other than Northern Ireland (regulated by the Northern Ireland Authority for Utility Regulation) and Scotland (regulated by the Water Industry Commission for Scotland). Access is facilitated by guidance provided by the Ofwat that is statutorily required to promote competition. The Ofwat also sets retail price caps for regulated water companies in accordance with efficient forward-looking costs derived from benchmarking monopoly companies. Access terms and conditions are determined by negotiation. If negotiations fail, the Ofwat may determine the terms and conditions of access. The Ofwat also has enforcement powers to ensure that a company complies with its access code and has powers to enforce its access determination.

In remaining benchmark countries, the primary role of any price regulation in water and wastewater is to regulate incumbents' price-setting power in retail markets. In the US, for example, economic regulation of water and wastewater usually takes the form

of rate-of-return regulation, market monitoring and service quality monitoring. It is typically the responsibility of state regulators and is intended to restrict the monopoly power of incumbents, rather than to promote competition. There are no third-party access regulations.

Australia appears to be a leader in applying economic regulation to water and wastewater with the aim of promoting competition. For example, this infrastructure area is subject to the economy-wide access regime (Part IIIA) and to the general competition provisions (Part IV) of the *Trade Practices Act*. There is also a state-based access regime for water industry infrastructure in NSW under the *Water Industry Competition Act 2006 (NSW)*. In addition, the establishment of the water management regime for the MDB has required the establishment of water-trading rules and water market rules. Under the *Water Act 2007*, the ACCC is required to develop, monitor and enforce water charges rules and water market rules in the Basin. The ACCC will also be required to provide advice to the Murray Darling Basin Authority on water trading rules.

Benchmarking performance of water and wastewater service providers is adopted by some EU countries including the Netherlands and the UK. The Netherlands is formally to introduce performance benchmarking of sewerage providers and water treatment providers on a compulsory basis. In Australia, the National Water Commission, jointly with relevant state and territory governments, publishes comprehensive reports on the performance of urban and rural service providers.<sup>7</sup> The latest report on urban water is described as ‘the world’s most comprehensive and detailed document on the performance of urban water utilities’.<sup>8</sup>

## **Rail**

Rail services in the benchmark countries are supplied by a mix of private and state-owned businesses.

In France, the national rail infrastructure is government-owned with two separate public enterprises responsible for infrastructure management and train operation respectively. The Dutch rail infrastructure is largely managed by a government agency and the public incumbent holds the exclusive right to passenger services. Similarly, in Ireland, there are two government-owned monopoly providers of rail infrastructure and railway services respectively. In Australia, the Commonwealth fully owns the Australian Rail Track Corporation (ARTC) which operates the interstate standard gauge network, and manages the Hunter Valley coal rail network and other regional rail networks on behalf of the New South Wales government. Below-rail infrastructure for intrastate freight and metropolitan rail networks is usually provided by state and territory governments. In New Zealand, the rail network was privatised in 1993 and was then repurchased in two steps – the Auckland urban rail network in 2002 and the national rail network in 2004.

In contrast, the Canadian rail network is mainly privately owned, although VIA Rail Canada is an independent Crown corporation that operates a national network of passenger trains. The rail network is also predominantly privately owned and operated in Sweden and the US.

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<sup>7</sup> Available on the National Water Commission’s website at: [www.nwc.gov.au](http://www.nwc.gov.au) [accessed on 28 April 2009].

<sup>8</sup> National Water Commission, *National Performance Report 2007–08: Urban Water Utilities*, Part A Comparative Analysis, 2009, p. 1.



A mixture of private and government-owned railway systems operate in some benchmark countries. Japan Railways Group consists of three privatised mainland companies, three government-owned island companies and one government-owned freight company. Additionally, there are many private railways offering passenger services in suburban and country areas, integrated to greater or lesser degrees into the JR systems. In the UK, the national rail network is operated by Network Rail (a not-for-dividend company limited by guarantee) under licence from the Secretary of State for Transport. There are also various train operating companies (TOCs) who operate under franchises granted by the Department of Transport under operating licences issued by the regulator.

Vertical separation of rail infrastructure from above-rail services has occurred in France, the Netherlands, Sweden and the UK, while in Germany, Deutsche Bahn remains vertically integrated. In Australia, there is one vertically integrated above-and-below-rail operator operating on a national scale (Queensland Rail).<sup>9</sup> In Japan, JR Freight has been separated from other JR companies that own the national railway network.

As with other infrastructure areas, rail in many benchmark countries has been opened to competition. However, the amount and impact of competition varies from country to country, potentially reflecting the considerable divergence in the regulatory frameworks applied to rail in benchmark countries. Access to freight services is usually mandated by government regulation that requires open access or sharing arrangements. While competition in passenger services may not be mandatory, it has been encouraged through competitive contracting or franchising, usually for operation in unprofitable regions.

In Australia, competition is facilitated by the national access regime under which, in 2008, the ACCC accepted an undertaking given by ARTC in respect of its interstate rail network.<sup>10</sup> Access to the Australian interstate (national) rail network is governed by Part IIIA of the *Trade Practices Act* and by state rail regimes in Queensland and Western Australia. In practice, regulation takes the form of access undertakings. However, access to intra-state track is subject to a multiplicity of state-based regimes which may hinder the extent to which competition arises.

In Germany, above-rail competition was introduced in 1994. However, the vertically integrated incumbent, Deutsche Bahn, remains dominant. The French rail-track owner was established in 1997 with the intention of separating it vertically and allowing competition to develop. However, the rail-freight sector was not entirely opened to competition until 2006 and the passenger rail segment is not scheduled to be fully opened until 2010.

In Japan, although competition in rail is permitted, participants must comply with the Japanese entry and exit permission system. There is also a ceiling-price permission system for approving passenger fares and rates. This is a form of *ex ante* price capping whereby the upper limits of passenger fares should be no higher than efficient cost plus appropriate profit for railway operations. In addition, a form of yardstick regulation is applied to encourage indirect competition among railway operators.

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<sup>9</sup> In Australia, there are other vertically integrated railways operating on a state or local basis. These include: Freight Link (Adelaide-Darwin), Genesee & Wyoming Australia (South Australia), BHP Billiton and RioTinto (Pilbara Rail).

<sup>10</sup> The undertaking covers the services provided by train operators on the rail network, including bulk freight, intermodal freight and passenger services.

Under this approach, the regulator considers a railway's relative performance at the end of each fiscal year and uses this as a basis for efficient costs in setting the upper limits for fares.

Reflecting the opening of the rail industry to competition, most of the benchmark countries have a rail access regime. However, the UK, the US and France are the only benchmark countries that regulate rail access prices. In the UK, access prices are regulated by *ex ante* price caps established on a five-yearly basis. In the US, the regulator can challenge *ex post* the reasonableness of certain common carrier charges.<sup>11</sup> French access charges are ultimately determined by the Minister.

In the remaining countries surveyed, access prices and non-price access conditions are generally determined by negotiation, which may be facilitated in a number of ways. In France, for example, the network operator publishes a reference document that provides the framework for negotiating access contracts. Complaints and objections concerning the reference document are made to the Minister who requests the regulator to investigate and make a recommendation to the Minister. However, as the creation of the reference document is highly consultative, there has been little disputation regarding pricing or other conditions of access.

In the Netherlands, the EU Rail Directives on market access and fair pricing (EU Directives 91/440/EC and 2001/14/EC) have been transposed into law. To facilitate access, the access provider publishes a Network Statement each year which includes a standard access agreement. Individual access arrangements are then negotiated with individual users. There is currently no *ex ante* supervision by the regulator of these individual access agreements. However the legislation provides for *ex ante* approval of a Framework Agreement which sets out the terms of agreement for a period of five years. To date, no such Framework Agreement has been submitted. Therefore, the principal role of the regulator is the *ex post* supervision of individual access arrangements. A similar requirement for the publication of annual network statement exists in Sweden and is being introduced throughout EU member states following the 2001/14 EU Directive, which requires infrastructure managers to produce and publish a network statement with the purpose of ensuring transparency and non-discriminatory access.

In Japan and the UK, access arrangements must be approved by the regulator. However, in other countries, the regulator simply has a monitoring role to ensure compliance with access rules, which generally focus on non-discriminatory access to infrastructure and associated services, and on compliance with pricing principles.

Where access negotiations fail, the regimes of most benchmark countries, such as Sweden, Canada and the US, include a dispute resolution mechanism. Some countries also use or encourage the use of informal dispute resolution before a formal complaint is filed.

The first EU Rail Infrastructure Package adopted in 2001 also mandates accounting separation between infrastructure activities and transport services activities. The package should have been transposed into national law and implemented by Member

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<sup>11</sup> As the economic regulator of the rail sector, the Surface Transportation Board is statutorily required to address issues relating to rate and service disputes, third party access to infrastructure, railroad mergers, and the construction, acquisition and abandonment of rail lines. See: the *United States Codes*, Title 49, ss. 10101–11908.

States. A second and a third railway package further set out arrangements for market opening for international rail freight transport and passenger services respectively. The second package should have been transposed and implemented while the third package is yet to be transposed. It appears, however, that a number of Member States, including Germany, have not been timely in compliance with the EU Directives.

### ***Airports***

Most of the benchmark countries classify airports according to size and function; international airports that cater for international and domestic passengers; domestic airports that cater mainly for domestic travellers; and smaller regional airports that cater mainly for domestic regional travellers.

A country's geography and demography can influence the number and type of airports in that country. For instance, the Netherlands and Ireland are geographically small countries, so that domestic air travel is relatively unimportant. While Germany is larger, its excellent road and rail networks have limited the role for domestic air transport, despite it being in the centre of Europe and an important hub for international air travel. Some of the larger countries with low population density, such as Australia, Canada and Sweden, have a relatively large number of smaller regional airports.

Generally, it is only major international and domestic airports that are subject to economic regulation although all airports typically have to comply with safety and other regulations.

Major airports in the benchmark countries are owned by a mix of government and private interests. In Germany, Frankfurt Airport is privately owned whereas both Munich and Berlin airports are owned jointly by a combination of federal, state and municipal governments. In New Zealand, Auckland Airport is in private hands whereas Wellington and Christchurch airports are a mix of national and local government ownership. In Japan the major airports are owned by the central government with the exception of Haneda airport which is privately owned. The French government owns all of the large French airports with the exception of *Aéroports de Paris* which have been privatised. The remaining government-owned airports are, however, in the process of privatisation. The three largest UK airports are privately owned, although some of them are currently being sold by BAA Limited under a divestiture order. National Canadian airports are operated by local airport authorities but are owned by the National government. Provincial governments own some regional and local airports while local interests own smaller airports. The Federal government owns the remote and arctic airports. In Australia, the major airports have been quasi-privatised and are operated by the private sector under 99-year leases entered into with the Commonwealth government. Airports in Ireland, the Netherlands, Sweden and the US are generally, at least majority-government owned; sometimes by a combination of various levels of government.

Regulatory arrangements for airports vary greatly across the benchmark countries. However, most of the benchmark countries regulate fees for various airport services that fall in the category of the so-called aviation activities on an *ex ante* basis.

In Japan, access fees at main international airports require approval from the Ministry of Land, Infrastructure, Transport and Tourism (MLIT).

In Australia, regional air services and facilities provided by Sydney Airport are declared under Part VIIA of the *Trade Practices Act* until 1 July 2010 and are subject to a CPI – X price cap.

In France, charges at public airports (those that fulfil certain criteria in terms of volume of air traffic and national importance) are set out in an economic regulation contract between the airport and the government. This contract also sets out quality objectives to be met by a particular airport. The contract is valid for up to five years and is subject to public debate and approval by the Minister.

In Germany, most airport charges are subject to traditional rate-of-return regulation using a ‘single-till’ approach.<sup>12</sup> However, price caps are implemented at some privately operated airports. In the Netherlands, tariffs and conditions for aviation activities provided to airline companies at Amsterdam’s Schipol airport are regulated. Tariffs must be cost-based and be reasonable and non-discriminatory. The regulator is required to oversee the consultation process prior to approving annual tariff changes. Tariffs for non-aviation activities fall within the scope of the *Competition Act*.

Price-cap regulation is adopted in both Ireland and the UK. In Ireland, aviation activities (runway landings and takeoffs, aircraft parking, air-bridge use and passenger processing) in airports that have in excess of one million passengers in the previous calendar year are subject to a four-year price-cap over total revenues per passenger. Aviation terminal charges levied by the Irish Aviation Authority in its provision of air traffic control services at Cork, Dublin and Shannon airports are also subject to price-cap regulation (using the building block approach and total revenues per tonne of maximum take-off weight). Similarly, aviation activities at designated UK airports are subject to five-year price caps on maximum revenue yield per passenger, and each airport is subject to a different cap. At the time of five-year review, the regulator must make a reference to the Competition Commission (UKCC) for recommendations on future price caps and report on whether any airport has engaged in conduct that is against the public interest. The regulator also has a role in investigating and enforcing anti-competitive behaviour by airports by imposing conditions on regulated airports that are found to have engaged in anti-competitive conduct, including in relation to access disputes.

In the remaining benchmark countries, airport charges are not regulated *ex ante*. In the US, federally funded airports have certain obligations in their funding contracts (grant assurances) such as non-discriminatory access to infrastructure built with federal funding or a prohibition against granting exclusive operational rights for infrastructure. The Department of Transport is authorised to review the reasonableness of airport fees if it receives a complaint or request for determination and a finding of a significant dispute.

New Zealand airports are generally able to set their own prices subject to the threat of price control if such prices are excessive. A recent review has identified a number of deficiencies in the regime, including a weak information disclosure regime, a weak threat of regulation and a requirement to consult rather than negotiate. Consequently, a new regime is to be introduced and will include a new information disclosure

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<sup>12</sup> Under a single-till approach to price regulation of air services, all of the revenue that an airport earns (including from services that are not essential for the provision of air services, such as retailing), are taken into account when determining the level of charges for the provision of regulated air-services.

regime, binding input methodologies for information disclosure, and non-binding pricing and weighted average cost of capital (WACC) guidelines to be developed by the NZCC. Airports will still retain the ability to set their own charges subject to the binding input methodologies and issued guidelines.

With the exception of regional air services and facilities provided at Sydney Airport, Australian airports are generally free to determine their own prices. However, their market power is intended to be constrained by the potential application of the generic access regime under Part IIIA of the *Trade Practices Act* (Sydney Airport is currently 'declared' under that regime). In addition, under the generic prices surveillance regime, Part VIIA of the *Trade Practices Act*, the ACCC also monitors the prices, costs and profits relating to the supply of aeronautical services at the major capital city airports as well as airport car park prices. The ACCC also undertakes quality of service monitoring in relation to certain airport facilities and services at a number of airports under the *Airports Act*.

In some benchmark countries, economic regulation also focuses on ground-handling services. In particular, the EU *Ground Handling Directive* (96/67/EC) has been transposed in European benchmark countries. Under the Directive, the services not exposed to full competition, i.e., baggage handling, ramp handling, fuel and oil handling, and freight and mail between the air terminal and the aircraft, must be provided by a minimum of two organisations, one of which must be independent of the airport operator and any airline that carries more than 25 per cent of the airport's traffic. Restrictions on entry are still permitted at airports that do not meet minimum traffic flow thresholds. Nevertheless, Member States can grant exemptions for reasons such as capacity constraints. Decisions in relation to restricting the number of ground services providers must be objective, transparent and non-discriminatory. However, under the French regulatory regime, restrictions on the number of ground handlers can be imposed by the Minister at the request of the airport manager. In such cases, decisions on new entrants are taken by the Minister after consulting with a committee that includes airport users. This procedure is claimed to give undue influence to the large airport users. The EC has also expressed concern about the potential distortions to competition that can occur when the airport operator also provides ground-handling services. In Sweden, this potential is minimised by requiring the regulator to make decisions regarding market entry where the airport operator also provides ground-handling services.

### ***Ports***

Port infrastructure in benchmark countries is predominantly government-owned, often at state or local level. In the UK, however, ports may be under private ownership, municipal control or run by a trust. US ports may also be government or privately owned, or a combination. Ports are generally operated independently by their respective authorities with port services provided by public-sector port management businesses or by the private-sector stevedoring companies or both.

In benchmark countries that classify ports into different categories on the basis of national significance or functions, ports of different categories can be governed by different authorities. For example, the largest 17 ports in Canada are regulated by an independent national regulator while smaller regional/local ports are directly regulated by the Department of Transportation. The focus of port regulation is on safety and environmental issues rather than economic regulation to promote competition.

In particular, there is little economic regulation of ports at the national level in any of the benchmark countries. Although in Australia, ports are subject to the national generic access regime and competition law of the *Trade Practices Act*, economic regulation is mainly the responsibility of state regulators. However, the ACCC does have a monitoring role under the generic prices surveillance regime of the *Trade Practices Act* in relation to stevedoring services provided at the ports of Adelaide, Brisbane, Burnie, Fremantle, Melbourne and Sydney. The ACCC will also assume a role after 1 October 2009 in relation to assessing undertakings submitted by wheat exporters who also operate grain storage and handling facilities at ports.

In most benchmark countries, port management, including the setting of prices and tariffs, is the responsibility of state or local governments and is often devolved to port authorities. In Canada, although the regulator is empowered to investigate whether fees fixed by port authorities are unjustly discriminatory, the regulator reports to the relevant port authority who then acts on the regulator's findings.

In Europe there has been considerable resistance to change to regulatory arrangements for ports as reflected in the failure in 2006 of the EU Draft Directive on market access to port services. A new consultation on port policy at the EU level aims to improve transparency in port administration in areas such as pricing structure and methodology, and public financing. Sweden is the exception among European benchmark countries. In that country, 'general ports' (those that are nationally important) are subject to universal access obligations and certain fees and charges for port usage are regulated. The regulator can also deal with port facilities disputes. Nevertheless, the main function of this regulator seems to be on safety issues rather than promotion of competition.

In addition, the US Federal Maritime Commission (FMC) regulates particularly two types of designated 'marine terminal operators' (MTOs) activities: the publication of MTO rates, regulations and other practices in MTO schedules; and agreements among MTOs or between MTOs and ocean carriers to discuss, fix, or regulate rates or other conditions of terminal services. However, the FMC's role does not involve setting port fees, providing for access to terminals or promoting competition between terminals.

### ***Themes***

A number of key themes emerge from this high-level discussion of industry structures and regulatory regimes in the benchmark countries.

#### *Changing Industry Structures*

It is evident that there has been considerable change in industry structures across all benchmark countries – most notably in energy and telecommunications. These changes have resulted from, *inter alia*, government policies of liberalisation and privatisation that aim to facilitate competition (and efficiency) and thus reduce prices in the provision of network services. Many of the government-owned incumbents have undergone, or are undergoing, corporatisation and privatisation. Competition and market entry has often been facilitated by the removal of legislative restrictions on entry and/or by the separation of potentially contestable elements from a monopoly structure. This is particularly the case in the energy sector, but has also been seen in other industries like posts and rail. The process of liberalisation in the EU Member States reviewed is often facilitated by the on-going development of a common EU market.

### *Consequential Regulatory Change*

These structural changes have necessitated new regulatory regimes to enable third-party access to major infrastructure, and to prevent infrastructure operators who have retained significant market power from exploiting that market power. These access regimes vary across infrastructure areas and countries, but generally include mechanisms to determine prices and non-price conditions on access (either by the regulator or commercial negotiation) and mechanisms to resolve access disputes in case negotiation fails. Compliance and quality of service monitoring may also be part of the access regime.

### *Degree of Industry and Sector Specificity*

Mostly, the regulatory regimes put in place are industry-specific or sector-specific. However, Australia also has a generic access regime set out in Part IIIA of the *Trade Practices Act*, a generic prices surveillance regime set out in Part VIIA of that Act and a national competition law in Part IV of that Act. New Zealand is the only other benchmark country that has a generic price regulatory regime. As in Australia, the New Zealand regime is set out in the national competition law in the *Commerce Act*. In New Zealand, both energy and airports are subject to the threat of price control if such prices are excessive. New Zealand has recently conducted a review of the *Commerce Act*. One outcome is that regulation of airports was found to have a number of deficiencies, including a weak information disclosure regime. Consequently, the latest amendment to the *Commerce Act* in 2008 introduced new provisions on economic regulation of the energy sector and airports.

Associated with the specificity of the regimes, most benchmark countries have regulators for specific industries or sectors (such as gas and electricity; telecommunications and post; rail, port and airport). For example the UK and the US have individual regulators for each of the industries or sectors reviewed. Sweden, the Netherlands and Canada all have regulators with broader authority over the three transport industries reviewed. Sweden, the Netherlands and Ireland (and the UK from later in 2009) have single agencies regulating telecommunications, broadcasting and posts. Australia and Germany are the only two countries having an ‘across-the-board’ regulator. A unique feature of regulatory institutional arrangement in the Netherlands is that the respective economic regulators for energy and transport are within in the country’s primary competition authority. With its light-handed approach, New Zealand has the Commerce Commission as the primary competition and regulatory agency.

### *Variations in Emergence of Competition*

The extent to which competition has emerged varies across industries and benchmark countries. For instance, in spite of the opening up of post and rail industries in most countries, incumbents often remain dominant long after the liberalisation took place. The reasons for this are likely to be complex and country-specific, which is reflected in the considerably diverging regimes applied across the benchmark countries. Regulations on telecommunication and postal services can be more complex due to the imposition of universal services obligations.

### *Role of the European Union*

For EU countries, common regulatory frameworks for each industry or sector reviewed are firstly set out in EU Directives and then transposed and implemented at the national level. It appears that the EU’s role in transport, including in rail and

airport, has been limited to date, compared to its influence on Member States' regulatory practice in energy, telecommunications and (increasingly) in water and wastewater. The introduction of full competition in EC postal services was recently extended to the end of 2010 – the deadline that Ireland is committed to meeting.



### 3. Aspects of Good Regulatory Design

This chapter draws out interesting aspects of regulatory design from the benchmark countries. It begins with a consideration of overall regulatory design issues, followed by a consideration of more specific design features by industry or sector. It is recognised that design features are a reflection of context – what may be appropriate in one set of circumstances may not easily transfer to another.

#### *Overview of Contextual Factors in Regulatory Design*

A country's regulatory regime is likely to be influenced by a range of geographic, economic, political, and legal factors. The salient factors to consider in moderating international designs might include the following.

The geographic size of the benchmark countries varies; ranging from geographically large countries like Canada, the US, Australia and Sweden, to the smaller countries like the Netherlands and Ireland. Larger countries tend to be federations that are comprised of a number of partially self-governing states united by a central government. Geographic size can also affect the relative importance of infrastructure industries and hence the need for regulation. While universal service provision is a general concern across telecommunications and postal services, it is a particular priority in countries such as Australia and Canada that have a large geographic mass and low population density. In Australia, for instance, the *Telecommunications (Consumer Protection and Service Standards) Act 1999* establishes a universal service regime. The main object of the regime is to ensure that all people in Australia, wherever they reside or carry on business, should have reasonable access, on an equitable basis, to certain prescribed telecommunications services. A similar regime is established under the *Australian Postal Corporation Act 1989* that requires Australia Post to fulfil its USOs in delivering standard letters at a uniform basic postage rate.

The economies selected include those from the full range of sizes of economic activities (measured by GDP), ranging from the three very largest OECD economies (the US, Japan and Germany), through medium-sized economies like Canada and down to two of the smallest in the OECD (Ireland and New Zealand). All of the benchmark countries have high GDP per capita relative to the world's average, highly developed economic infrastructure and mature regulatory institutions. According to the Central Intelligence Agency (CIA), the average world GDP per capita (purchasing power parity (PPP)) in 2007 was US\$ 10 000. The GDP per capita of the benchmark countries in 2007 ranged from US\$ 27 300 (New Zealand) to US\$ 45 800 (the US).<sup>13</sup>

The political systems of the benchmark countries vary. While most of the benchmark countries are constitutional monarchies, where a prime minister is the active head, others are republics led by either a president (the US) or a prime minister (Ireland) or both (France and Germany). In all countries (except for the US), ministry is subject to parliamentary confidence. In countries with a federal structure (Australia, Canada, Germany and the US) some powers are shared by national and state governments as prescribed by a constitution. The national governments in these countries, in particular, face challenges for the achievement of national goals where their powers are shared with state governments representing local interests.

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<sup>13</sup> CIA, *The World Fact Book*, Available at: <https://www.cia.gov/library/publications/the-world-factbook/print/xx.html> [accessed on 10 November 2008].

A country's legal context could influence a number of aspects of the regulatory regime including the regulator's jurisdiction, powers and responsibilities as well as the extent to which regulators' decisions may be appealed. For instance, with the exception of New Zealand and the UK, each benchmark country's legal framework is set out in a written constitution.<sup>14</sup> Among other things, the constitution typically allocates powers in relation to regulatory matters between the various layers of a country's government. Thus the traditional role for sub-national governments in water and wastewater and ports often reflects a country's constitution. In the US, the regulatory regime for telecommunications is influenced in part by the constitutional role of the states in the provision of intrastate telecommunications. In the case of France, the concept of 'public ownership' has been written into the 1946 Constitution, reflecting the underlying political ideology. This factor constrains the French regulatory regimes and means that decision making power resides with the relevant Minister rather than an independent regulator.

Different political and legal systems inherent in the European countries have posed a challenge in the unification of Europe. As Member States are adapted to a common European Union system, this may have led to gradual centralisation of power to national governments or required greater coordination among state or local governments within a Member State.

### ***Overall Regulatory Design Issues***

#### *Finding a Principled Approach to Better Regulation*

The liberalisation of infrastructure sectors in benchmark countries over the past two decades has required political support to implement pro-competitive microeconomic reforms such as corporatisation, and later, privatisation and – where considered necessary to promote competition – vertical separation. At times there has been debate and disagreement about process and jurisdiction, and some delays in implementation. In some benchmark countries there has been considerable political opposition to such reforms. For example, in France, incumbents remain largely state-owned reflecting *dirigiste* beliefs and the strength of organised labour. Strong incumbents may also be able to resist vertical separation and exposure to competition.

The coherence of a country's regulatory regime is influenced by the political context. In the UK and Ireland for example, existing regulatory regimes are based on 'principles' that guide regulatory design and practice. Although some Irish infrastructure remains effectively unregulated, in 2004 the Irish government published a White Paper titled *Regulating Better*. This paper sets out six principles of good regulation that will be considered in existing and future regulatory arrangements.<sup>15</sup>

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<sup>14</sup> Although New Zealand and the UK are constitutional monarchies, there is not a single written constitution. Instead, the constitution of New Zealand consists of a collection of statutes, Treaties, Orders-in-Council, Letters patent, decisions of the Courts and unwritten constitutional conventions. The UK's unwritten constitution consists of statutes, common law and practice.

<sup>15</sup> Similarly, the Better Regulation Executive of the UK Cabinet Office has since 1998 set out five principles of good regulation which independent regulators should consider when introducing new proposals or evaluating existing regulations. Available at: <http://www.berr.gov.uk/whatwedo/bre/consultation-guidance/page44482.html> [accessed on 1 June 2009]. In Australia, while not in the context of infrastructure regulation, the Productivity Commission has enunciated 'six principles of good regulatory process'. See Gary Banks, public address on the topic, *Reducing the Regulatory Burden: the Way Forward*, at the Monash Centre for Regulatory Studies, Melbourne, 17 May 2006, Available at: <http://www.pc.gov.au/speeches/cs20060517> [accessed on 26 November 2008].

Similarly, the performance of most UK regulators is subject to regulatory principles set out in the enabling legislation. By following a ‘principled’ approach to regulation, the regimes in these countries are generally more coherent and consistent than regimes in countries that have not taken this path.

Initiatives at the EU level are guiding regulatory regimes in member countries and may be driving changes in regulatory regimes in those countries. The means by which the EU influences infrastructure regulation is through the development, issuing and ‘enforcement’ of Directives relating to the regulation of key economic infrastructure. Countries such as the UK, Germany, Ireland, Sweden and the Netherlands have largely transposed EU Directives into national law and are implementing regulatory regimes that are in compliance with the EU Directives. At least some of the changes that have occurred to French regulatory regimes may be the result of implementing EU Directives rather than responses to internal political or economic pressures for change. In this regard, French telecommunications, posts and energy tend to be more liberalised and have relatively more transparent and consultative processes, while regulation of the French rail, airports and ports does not strongly display these characteristics.

In contrast, the regulatory regimes in some benchmark countries have developed in a less systematic, or planned, fashion. For instance, the regulatory institutional structure in the US is complex; drawing upon a long history of experiment and pro-competitive reforms dating back to the early twentieth century, particularly for rail and post. In particular, the ‘essential facilities doctrine’ was developed by courts through interpretation of the *Sherman Act*. In Japan, although several infrastructure areas have been reformed, there is little uniformity in approach.

Perhaps because of its federal structure, the Australian experience seems to combine aspects of both the principle-based and less systematic approaches to regulation. As a federation, legal powers may rest with the Commonwealth government, state and territory governments, local governments, or be shared by them.<sup>16</sup> The Constitution also enables the States voluntarily to hand over responsibilities to the Commonwealth (referral of power). As well as allowing the Commonwealth to make laws, referral of power also means that the States can cooperatively enact identical legislation to the Commonwealth to set uniform standards. Inter-government actions have been coordinated through the Council of Australian Governments (COAG) formed since 1992. The establishment of the national gas and electricity markets, agreed by the COAG, has relied primarily on referral of power. However, this process is generally not smooth as states are generally reluctant to cede powers to the Commonwealth.

With respect to the economic regulatory regime, a major influence in Australia is the NCP reform agenda, which was agreed in April 1995. The NCP is underpinned by three intergovernmental agreements including the *Competition Principles Agreement* (CPA), which is intended to guide governments in the reform and regulation of economic infrastructure. Implementation of the NCP has required ongoing bipartisan co-operation between the three layers of Australian government. At times there has been debate and disagreement about process and jurisdiction, and some delays in

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<sup>16</sup> For example, under the *Commonwealth of Australia Constitution Act 1900*, the responsibilities to regulate railways generally lie with the relevant state and territory government. However, the Constitution does permit the Commonwealth to engage in the acquisition, construction and extension, with the consent of a State, of any railways within the State (s. 51, xxxiii-xxxiv).

implementation. In some Australian states, there has been political resistance to privatisation of infrastructure assets (e.g. electricity in New South Wales).

#### *Division of Powers between Legislature and Regulator*

A fundamental issue of regulatory design is the extent of the regulator's powers and the degree of its discretion. In part, this relates to the degree of detail in the legislation. A high level of prescription creates the risk that the regulator will be required to make a decision that is not tailored to the circumstances of an individual case. However, a high degree of discretion creates uncertainty, and the risk of misuse of discretion. At one extreme, some regimes delegate a broad discretion to a regulator to set a price according to criteria such as 'fair and reasonable'. At the other end of the spectrum, some countries seek to eliminate discretion through tightly specified pricing or revenue formulas. Getting the appropriate balance is not easy – although greater flexibility is usually more important in industries in which there are rapid changes to market conditions (such as technological innovations in telecommunications); and less important where the regulator has a prior pattern of consistent and appropriate decisions.

Another issue of interest is the division of responsibility between the economic regulator and other bodies. That is, whether for example, decisions regarding a USO or structural separation are made by the economic regulator or by another body (and therefore exogenous to the economic regulator). This issue also relates to the question on the objectives of regulation; particularly the supplementation of economic objectives (efficiency, competition and cost recovery) with broader ones relating to social justice and the environment.

#### *Authority over Structural Separation*

Various forms of separation may provide an alternative to the regulation of conduct. The incentive for an infrastructure provider to provide access depends in part upon whether the provider also operates in a related market in which the infrastructure service is a production input (vertical integration). Some form of 'ring fencing' may be an alternative to a requirement to provide access on equivalent terms and conditions.<sup>17</sup> Alternative forms of ring fencing include:

- accounting separation – the maintenance of separate financial records for the infrastructure service and upstream/downstream service;
- functional/operational separation – the separation of business units, and the imposition of operational rules on the business units (such as controls on sharing of staff and information);
- legal separation – the creation of a separate legal entity to provide the infrastructure service, but allowing cross-ownership between that entity and another entity that provides an upstream/downstream service; and
- structural separation – there is no cross-ownership between the entity that provides the infrastructure service, and another entity that provides an upstream/downstream service.

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<sup>17</sup> In this context, 'ring fencing' can be defined as segregating particular activities and financial accounts derived from monopoly services from those that are subject to competition.

It is unusual for the regulator to have the power to require full structural or legal separation. Where separation of this type has occurred it has typically been implemented by the government (usually at the time of privatisation). For example:

- New Zealand electricity regime (which prohibits line businesses from owning retail or generation initiatives, other than renewable generation capacity);
- United Kingdom rail regime (where rail activities were structurally separated at the time of privatisation).

One exception exists in the US, where the energy regulator (the FERC), has mandated the separation of interstate gas pipeline operations from the sale of natural gas.

A wide discretion to accept undertakings may also provide regulators with some scope to implement structural solutions. For example, in the UK, the telecommunications regulator (Ofcom) accepted an enforceable undertaking from BT to separate legally its wholesale and retail functions. In the US, the Department of Justice and AT&T reached a settlement in 1982 in an antitrust case where AT&T agreed to divest its local operating companies.

In Australia, regulatory bodies have very limited powers to alter market structures. In some cases, however, the government has influenced structure to address competition concerns; for example, the Australian airports regime put in place by the government at the time of privatisation prohibits cross-ownership of airports and airlines.

#### Social and Environmental Objectives

Generally, governments have a primary responsibility for addressing economic, social and environmental issues through forming public policies, and, under this umbrella, the primary role assigned to regulators by government is to promote economic objectives. However, this division of responsibility may not always be clearly cut. This is particularly evident in the UK where, as well as promoting effective competition and regulating monopolies in the interests of consumers, both the Ofwat and the Ofgem have a general duty to have regard to any guidance on social and environmental matters issued to the regulators by the Secretary of State.<sup>18</sup> In the latter case, the Secretary of State is required by law to give the Ofgem guidance as to how to perform this general duty.

Across the benchmark countries, social and environmental policies of governments have an increasing influence on the design of regulatory regimes. Many regulatory regimes aim to promote consumer interests, with the underlying view that promoting competition and efficiency is the best way to achieve that aim. However, USOs, protection of disadvantaged and low-income consumers and the pursuit of environmental objectives such as the abatement of climate change create the potential for conflict with efficiency-based regulatory objectives and thus may necessitate the careful balancing of these potentially conflicting priorities. In the UK, a Communications Consumer Panel has been established, with a statutory function of advising the Ofcom on the consumer interest in the markets that the Ofcom regulates. Particular attention is required to be paid to vulnerable consumers (for example, rural consumers, older people, people with disabilities and those who are on low incomes

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<sup>18</sup> This responsibility is set out in the *Utilities Act 2000* and the *Energy Act 2004* for the Ofgem and in the *Water Act 2003* for the Ofwat. The guidance relates to the making of a contribution by the regulator towards attainment of any social or environmental policies set out or referred to in the guidance.

or otherwise disadvantaged). In Ireland, the energy regulator is legally required to promote renewable energy forms.

There are some clear consequences from broadening the requirements on economic regulators:

- Broader and different consultation arrangements have been necessitated by objectives relating to sustainability and renewability of energy. In the UK, the Ofgem's sustainable development objective has necessitated wider consultation and the use of Environmental Impact Statements. The Ofgem expects that Environmental Impact Assessments will usually form a part of its Regulatory Impact Assessment and has noted that a separate environmental statement may be prepared for large matters such as price control reviews.<sup>19</sup> However, it is unclear whether consultation times have increased as a result. The Irish regulator has chosen to change the manner in which it processes applications for generation licences, with the aim of facilitating the connection of renewable generators to the transmission and distribution systems in a timely manner.
- In order to protect the needs of vulnerable consumers, the Ofcom in the UK has established an Advisory Committee for Older and Disabled People to provide advice and comment on consultations affecting those consumer groups. The Ofcom has also set up the Advisory Committees for the Nations (one committee each for England, Northern Ireland, Scotland and Wales), which are required to identify and advise on issues that are of particular national importance. These Committees are funded from the regulator's budget and staffed by its own employees, implying some financial and resource diversion costs.
- The need to balance competing objectives may be costly in terms of time and resources. The Ofgem's statutory responsibility to protect vulnerable consumers means it seeks to ensure that prices paid by those consumers are affordable. The Ofgem recognises that its ambit to reduce fuel poverty is in conflict with its environmental objectives and emphasises the necessary role of the government in providing affordable housing and support.<sup>20</sup> Similarly, the Ofwat aims to take affordability and debt concerns into account when reviewing charging mechanisms for water companies. However, in the absence of a counter-factual situation, it has been difficult to isolate the practical effect of these broader regulatory objectives on procedures.
- Competing statutory objectives could also potentially leave regulatory decisions more open to appeal, but no direct evidence was found in support of this.

The legislation in Australia governing infrastructure provision tends to concentrate on efficiency and competition objectives. Universal service obligations are present in telecommunications and posts.

### Nation Building

Another issue regarding the economic regulator's authority arises in relation to the control or influence of infrastructure investment. For example, this could take the

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<sup>19</sup> Ofgem, *Ofgem's Introduction of Environmental Impact Assessments*, Available at: [http://www.ofgem.gov.uk/Sustainability/Environment/Policy/Documents1/3348-env\\_impact\\_ass.pdf](http://www.ofgem.gov.uk/Sustainability/Environment/Policy/Documents1/3348-env_impact_ass.pdf) [accessed on 8 December 2008].

<sup>20</sup> Ofgem, *Sustainable Development Report*, Report 163/08, 17 December 2008, p. 6.

form of approval requirements for the installation of an electricity generating facility; the construction of a gas pipeline or the establishment of a high-speed cable network. This type of regulation applies particularly in energy and telecommunications, but also arises in relation to ports; water and wastewater; airports; rail and posts. Perhaps the most potent examples come from countries that emphasise *dirigisme*, 'nationalism' and 'nation building', such as Japan, France and Germany. Another theme is that such controls are more common where there are externalities involved in the development, such as in the integrated development of river basins in Japan and the EU.

### ***Regulatory Design Issues for Specific Infrastructure Areas***

#### *Energy – Typically Showing Features of Advanced Regulatory Design*

Arrangements for economic regulation of the energy sector across benchmark countries tend to be relatively sophisticated, transparent and consultative. Most of the benchmark countries have an energy sector-specific national regulator. The exceptions are Japan, where regulatory decisions regarding energy are made by the Ministry of Economy, Trade and Industry (METI); and Germany, where an across-the-board utility regulator – the FNA – includes regulation of the energy sector.

The imperative to reform infrastructure and introduce 'best practice' economic regulation may be influenced by the extent to which the activity is integrated into the global economy. In this context, it is perhaps not surprising that reforms have progressed further in those markets, including energy, which provide vital inputs to all areas of the economy.

A country's geography can also influence its regulatory regimes in a number of ways. For example, a country's geographic size and proximity to its neighbours can affect the extent to which it can physically integrate its markets and infrastructure networks across regions and with other countries. A more integrated market may call for a coherent national or international regulatory policy. Establishment of the common European market among geographically proximate countries requires adoption of Directives which, among other things, promote regulatory consistency (although as noted elsewhere the extent to which consistency is achieved is influenced by political factors). Likewise, the integration of the Canadian gas market into the much larger North American gas market has apparently influenced Canadian gas regulatory policy.

Canada's low population density and large geographic size appears to have weakened the scope for competition in the supply of electricity to develop between its provinces and internationally, thus necessitating a different approach to regulation of electricity. Energy regulation is divided between federal and provincial regulators: the National Energy Board (NEB) regulates inter-provincial and international gas transmission and energy development while a provincial regulator (e.g. the Ontario Energy Board or the Alberta Utilities Commission) is responsible for the provincial energy markets. This jurisdictional split of regulatory responsibility between the federal and the states also applies to the US.

There are some interesting design features for energy regulation from the benchmark countries. For instance, self-regulation is a feature of the Japanese energy regulatory regime. Two independent bodies – the Electric Power System Council of Japan (ESCJ) and the Japan Electricity Power Exchange (JEPX) were set up during reform of Japan's electricity industry. The former is a company designated for supporting the

smooth operation of the national electricity power system and the latter is a neutral organisation that operates physical spot and forward markets for wholesale power exchange.

In the Netherlands, the Office of Energy Regulation (OER) within the Netherlands Competition Authority (NMa) conducts annual monitoring of the wholesale and retail markets in electricity and gas. This includes a review of day-to-day price movements and other issues of concern to the regulator and market participants. The monitoring outcomes, along with key areas of focus in the energy sector in the following year, are published in an annual report.

In France, the Committee for Disputes Settlement and Sanctions (CoRDIS) within the Energy Regulation Commission (CRE) is responsible for mediating sanctions and disputes concerning access and use of public electricity and natural gas networks. A designated *rapporteur* communicates between the various parties and coordinates the administrations of the dispute resolution process.

In the US, functional unbundling (that is, functional separation of the electricity utilities' transmission and power marketing functions) has been required by the FERC since 1996 in order to ensure open access to inter-state transmission networks. Further requirements, including the development and publication of consistent methodologies for calculating available transfer capability, and participation in an independent regional transmission organisation (RTO) that administers network access, were subsequently introduced for non-discriminatory provision of inter-state transmission services.

During the 1980s Australia implemented a range of microeconomic reforms which reduced trade barriers and created a more flexible and trade-oriented economy. This, in turn, revealed the need to reform traditionally government-owned, monopoly infrastructure – including energy – to ensure that Australian businesses could compete effectively in global markets. This need ultimately led to the implementation of the NCP, and the move to greater centralisation of energy regulation. However, as it is uneconomic to link the electricity transmission grids on the east and western coasts because of vast distances and low population, the West Australian market is not part of the National Electricity Market (NEM) and is subject to a state-based regulatory regime.

#### *Telecommunications – Advanced Regulatory Design and Continuing Review*

Across the benchmark countries, telecommunications regulatory regimes are sophisticated and have features of advanced regulatory design and transparent and consultative decision-making processes. This is a result of economic reforms that have taken place in this rapidly changing, traditionally government-owned natural monopoly industry.

Institutional arrangements for the regulation of telecommunications vary across countries. Such regulation may be within the ambit of an institution with 'across the board' responsibilities (Germany's FNA or the NZCC) or the province of ministerial directions – Japan's Ministry of Internal Affairs and Communications (MIC). However, the most common arrangement is for telecommunications to be regulated by an institution with responsibility for other areas of communications like spectrum management, broadcasting or posts. Telecommunications are regulated by institutions with one or more of these additional responsibilities in each of the UK (Ofcom), the US (the FCC), France (ARCEP), Ireland (Commission for



Communications Regulation, ComReg), the Netherlands (the Independent Post and Telecommunications Authority, OPTA), Sweden (Swedish Post and Telecom Agency, PTS) and Canada (Canadian Radio-television and Telecommunications Commission, CRTC).

Arrangements for third-party access to fixed-line networks and access to mobile termination are generally in place in the benchmark countries. Operational separation of vertically-integrated operators is prescribed in a number of countries, including the UK and New Zealand. BT, in the UK, is subject to an undertaking setting out commitments in respect of operational separation of its wholesale and retail functions and offering a wholesale line rental product to third-parties on a non-discriminatory basis.

Because of rapid technological change in global telecommunications markets, there are ongoing national reviews of the need for, and appropriate form of, regulation in the industry. For instance, the UK telecommunications regulator, the Ofcom, is currently undertaking a 'strategic review' of mobile telecommunications in response to significant changes in the industry in recent years. The regulator has noted that, although evolution continues to be rapid, entry is still difficult and not all citizens and consumers have benefited from mobile services in the same way. It considers that the continuing success of mobile telecommunications will require regulation to change as the industry changes.

Telecommunications reform in Australia has progressed gradually with the introduction of competition since 1991 and the privatisation of the incumbent operator – Telstra – completed in 2006. The ACCC, as a regulator with broad regulatory responsibility for infrastructure industries, is also the economic regulator of telecommunications. Industry-specific access regimes apply to 'declared services' based on a 'long-term interests of end-user' test conducted by the ACCC. Telstra is required to comply with licence conditions, including a requirement for a relatively weak form of operational separation in conducting wholesale, retail and network businesses. Universal service obligations and customer service guarantees are the responsibility of the Australian Communications and Media Authority. The Federal Government has recently commenced consultation on *Regulatory Reform for 21<sup>st</sup> Century Broadband*, seeking public comments on 'ways to improve telecommunications regulations to make it work more effectively in the interest of consumers and businesses'.<sup>21</sup>

#### *Posts – Country-specific Factors Critical to Regulatory Processes*

The regulatory approach to postal services varies greatly across the benchmark countries, with greater variation for this industry than for any other of the six industry areas surveyed. The following institutional arrangements can be observed:

- Industry-specific regulators – Japan (the Postal Services Policy Planning Bureau (PSPPB) of the MIC), and the US (the Postal Regulatory Commission, PRC)
- Regulators with responsibility for postal services along with telecommunications and perhaps other communications – France (ARCEP), Ireland (ComReg),

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<sup>21</sup> Prime Minister, *Joint Media Release with Treasurer, Minister for Finance and Minister for Broadband*, April 2009, Available at: [http://www.minister.dbcde.gov.au/media/media\\_releases/2009/021](http://www.minister.dbcde.gov.au/media/media_releases/2009/021) [accessed on 26 May 2009].

Netherlands (OPTA), Sweden (PTS), and soon the UK (Postcomm to be incorporated into Ofcom)

- Regulators with responsibility for postal services as part of a broader regulatory remit across main infrastructure industries – Germany (FNA)
- No relevant regulator – New Zealand (Deed of Understanding) and Canada (Ministerial direction)

Postal services in all the benchmark countries are subject to economy-wide competition law enforced by a designated national competition authority. In respect of the economic regulation of postal services, the following arrangements can be observed:

- In all ten countries, the retail prices of some core services are regulated, or subject to some degree of regulatory oversight. However, the approach is comparatively ‘light handed’ in Japan, Canada and New Zealand where the relevant universal service providers have authority for rate-making, subject to certain constraints.
- In all countries except Ireland, some form of third party access regime mandates access to all or part of the postal network on reasonable and non-discriminatory terms and conditions. Regulators will intervene *ex post* when access disputes arise. In the US, worksharing activities are regulated both *ex ante*, via price regulation, and *ex post* through dispute resolution.
- In all ten countries, some form of USOs exists with respect to prices and quality of service standards. These obligations are often accompanied by some degree of statutory monopoly (the exceptions are New Zealand, Sweden, Germany and the UK).
- Licence requirements for entry into non-reserved postal markets differ across the benchmark countries, ranging from basic requirements relating to character, qualifications and technical competency, to more onerous requirements such as demonstrating an ‘ability to provide a universal ‘general correspondence’ delivery service’ (e.g. Japan). The procedures for obtaining a licence include registration as a business (e.g. the US), registration with the Ministry or the regulator (e.g. New Zealand), authorisation by the regulator (most countries) and permission by the regulator (e.g. Japan).<sup>22</sup>

Political concerns and incumbency power appear to influence regulatory regimes for postal services. For instance, although the postal industry in all of the benchmark countries has been opened to competition, most incumbents are protected from competition in the supply of certain ‘reserved services’ reflecting USOs. However, over time, liberalisation has reduced the scope of reserved services.

In Japan, no private operator has entered the market since the introduction of the permission system for entry into the ‘general correspondence’ delivery business. There is concern that the incumbent does not compete in a competitively neutral way reflecting its incumbency advantages. Political ‘culture’ and ideology also influence the Japanese postal incumbent’s attempts to enter new markets. For instance, the regulator must consider the impact of the incumbent’s entry on existing *private*

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<sup>22</sup> Authorisation generally involves the grant of a licence provided the applicant meets certain licensing requirements on technical qualification, safety, and so on. Permission, in the case of Japan, involves more rigorous scrutiny on the applicants for meeting extra requirements.

operators before granting the incumbent ‘permission’ to enter new markets. This requirement may also reflect concerns about a ‘level playing field’.

The EU countries have led the process towards postal privatisation, liberalisation and deregulation. However, full deregulation of the EU postal industry has been delayed for two years (1 January 2011 instead of 1 January 2009) and private-sector operators have experienced setbacks in attempting to enter the addressed mail delivery market. In response to market developments, Sweden and Denmark’s national postal operators are going to merge in 2009.

Strengthening competition from other non-postal service may necessitate changes to the postal regulatory regimes. For instance, the Canadian postal system is currently undergoing a strategic review as the postal industry has to adapt in response to the increasingly popular e-communication technologies.

Posts is included amongst the diverse range of infrastructure industries for which the ACCC has regulatory responsibility. There is an access regime that applies to bulk interconnection services. Entry into non-reserved postal services is subject to a licensing requirement of registration as a business. In contrast to the Japanese approach, the Australian approach to ensuring a ‘level playing field’ lies in the competitive neutrality policy. The *Competition Principles Agreement* requires Australian governments to establish transparent processes for investigating complaints that governments are not implementing competitive neutrality principles appropriately. These processes may include a recommendatory role to the relevant Minister about possible changes to the way the relevant government-owned business operates. The degree of competition observed in the EU and elsewhere seems unlikely to be achievable in Australia, given its relatively small market size and the fundamental differences in market and industry structure between Australia and Europe. In particular, European incumbent postal operators are increasingly competing in other national markets.

#### *Water and Wastewater – Support for a Whole-of-Basin Approach*

Water and wastewater utility services in all countries are provided at the local and/or state level. The operators are usually under municipal or state ownership, and subject either to basic economic regulation, such as retail price controls unrelated costs of provision, or no economic regulation. Local operators usually enter into some form of association for the supply of bulk water and the disposal and treatment of wastewater. However, local management and regulation has not been adequate to address broader issues within river basins, such as deciding between competing users, pollution, flood control and hydroelectricity production. As a consequence there has been a tendency towards an integrated river basin-wide approach.

A major issue at local and broader levels is that the price of water does not reflect economic costs of using water, in particular the environmental costs. Only recently notions of cost-reflective pricing have been raised. The *EU Water Framework Directive 2000* sets out the requirement that users pay for the full cost of their use of water and wastewater services, including operational, environmental and resource costs. In countries with developed water systems, such as France, England and Wales, and the Netherlands, some combinations of tariffs, taxes and other charges are charged on the basis of fully (or almost fully) recovering the cost of the service. This reflects the practical application of the ‘sustainable cost recovery’ principle using ‘3Ts’ (i.e., tariffs, taxes and transfers) rather than the ‘full cost recovery’ principle

based on tariffs only.<sup>23</sup> However, there remains resistance to charging for water usage in many countries. For example, despite its transposition of the EU Water Directive, domestic water usage in Ireland is free. Similarly, there has been considerable resistance to water metering in the UK. There is also evidence that attitudes to water are related to its abundance, with countries like Ireland and Canada displaying great resistance to the economic pricing of water, and countries with less abundance, like the United States, being more inclined towards the application of economic pricing principles.

The recognition of the importance of integrated management of large river basins is evident in Japan, where difficulties arose from uncoordinated water acquisition and wastewater disposal treatment in the 1950s' industrialisation, leading to problems including attaining adequate supplies, deciding allocation amongst competing claimants, pollution, and flooding. These were addressed by the 1961 *Water Resources Development Promotion Law* establishing the new principle of 'One river system – one administrator' and centralised control of key river basins. These arrangements were initially administered through the Water Resource Development Public Corporation (WARDEC), and, in 2003, its functions transferred to the Japan Water Agency (JWA). The JWA is a semi-governmental body under the supervision of five ministries covering environment, economy and industries. These ministries reflect the full diversity of interests involved in water and wastewater. The JWA now has approximately 1 650 staff.

The use of a basin-based approach has recently been introduced in the *EU Water Framework Directive*. The implementation of the key elements of the Directive has not been easy, as evidenced by the very gradual implementation requirements, and the 'disproportionately expensive' clause allowing even further delays. The various interests vested in the competing uses of water have beset the attempts at fundamental redesign of European water regulation in the 2000s, but some countries with strong national governments have been able to achieve seemingly successful basin-wide redesign.

The extent of implementing the EU Directive also appears to be influenced by the relative importance of water as an input into energy markets – for instance, if it is used to generate hydro-electricity or to cool nuclear reactors. The majority of French electricity is generated by nuclear power plants, while Sweden relies on a combination of hydro and nuclear power. Both countries appear largely to have implemented the Directive. In contrast, nearly all of Ireland's electricity is generated by burning fossil fuels, and it has no nuclear energy. There is no economic regulation of water undertaken by the Irish national government other than the on-going development of river-basin districts required under the Directive.

In Australia, where water shortage is increasingly evident, there has long been the recognition of the importance of taking a basin-wide approach to water management, with a strong focus on the Murray-Darling Basin (MDB). As a utility, water and wastewater services are provided by state or local government enterprises and the subject of state responsibilities in all urban areas and rural areas outside the MDB. While all states and territories have independent economic regulators that oversight the water and wastewater industry, their roles and authorities vary. The implementation of an integrated approach has been difficult, resulting in the

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<sup>23</sup> OECD, *Managing Water for All: An OECD Perspective on Pricing and Financing – Key Messages for Policy Makers*, 2009,

persistence of problems of over-allocation of water; inefficient distribution of water rights; excess salinity and other forms of environmental degradation.<sup>24</sup> Government actions to address these issues have been complicated by the conflicting interests of the states; the influence of vested interests and the fundamental impediments to the ‘internalisation’ of externalities.

### *Rail – Design Challenges Presented by an Increasingly Competitive and Integrated Industry*

The rail regulatory regimes vary considerably across benchmark countries, reflecting, *inter alia*, the country’s size; the diversity in ownership of above- and below-rail infrastructure; the various layers of regulatory responsibility and competing interests between passenger and freight users. Designers of regulatory arrangements for rail have usually had to deal with three key issues:

- Designing regulation to address the tension between, on the one hand, infrastructure management requiring specialised knowledge and experience, and the requirements for equal access in pursuit of competition objectives on the other.
- Dealing with the supply-chain issues as transport modes and terminals like ports and airports become increasingly integrated with one-another and industry boundaries become blurred.
- Sorting through the legacy of possibly inconsistent operational and regulatory arrangements across different levels of government.

Competition has been introduced into the rail industry in all benchmark countries except Ireland and New Zealand, but there is considerable divergence in regulatory design; particularly related to the tension between retaining the incumbent’s expertise in infrastructure management and the requirement for regulatory independence. This issue also goes to the question of structural separation.

There has been a tendency for greater independence of the regulator from the regulated industry. Sweden and the UK are among the countries to separate their rail industries structurally, but their institutional arrangements differ. While the UK has retained a rail-specific regulator, Sweden has moved rapidly from having the incumbent as the regulator, through having a rail-specific regulator (2004 to 2008) to a broader transport sector regulatory institution (beginning 2009). The Netherlands and Canada also have adopted a regulatory arrangement where a single body is responsible for a range of transport regulation.

The tendency towards sector-based transport regulation may be enhanced by the other significant trend in rail and transport generally – the greater integration between modes of transport and ‘terminals’ such as ports and airports. The determination of bottlenecks and market power more generally extends beyond traditional industry boundaries, and the implications of regulatory actions requires a ‘general-equilibrium’ analytical approach taking in the substitutability and complementarity relationships between different production components and services provided. However, the road infrastructure in benchmark countries has traditionally been government-provided and is not independently regulated. According to the Productivity Commission (PC), competitive distortions between road and rail in Australia have been limited because

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<sup>24</sup> See, for example, W. Blomquist, B. Haisman, A. Dinar and A. Bhat, ‘Institutional and Policy Analysis of River Basin Management: The Murray Darling River Basin, Australia’, *World Bank Policy Research Working Paper* 3527, February 2005.

of their limited substitutability and much complementarity.<sup>25</sup> It recommended that the COAG should oversee regulatory reform to both rail and road for enhancing efficiency and productivity within each mode of transport.

Most regulatory regimes provide for access prices to be decided by negotiation with *ex post* determination by the regulator in the event of a dispute. In accordance with the *EU Directive 2001/14/EC*, several European countries have procedures of development and publication of a network statement by the infrastructure manager, which are intended to reduce the incidence of access disputes. For example, in France, the network operator publishes a reference document that provides the framework for negotiating individual access contracts. The creation of the reference document involves a consultative process so that there is consequently less dispute after its publication. Similarly, in the Netherlands, the access provider publishes a network statement that includes a 'standard access agreement' that forms the basis of negotiation with individual users.

In the US, the Surface Transportation Board (STB)'s dispute resolution process has led to concerns about the costs and timeframe for resolving disputes arising from powerful incumbents' incentives to cause delay. Procedures have been implemented to address those concerns in relation to small and medium rates cases. However, delays in large cases continue to be of concern to the regulator.

Some of the benchmark countries have put in place alternative procedures to formal litigation, such as mediation and arbitration, to resolve disputes. Regulators may concurrently encourage the resolution of disputes through more consultative means outside of the regulatory process before approaching the regulator.

The issue of coherent regulation by different layers of governments in exercising their authorities over rail infrastructure is particularly relevant for federations where rail regulation is statutorily shared between national and sub-national governments. For example, in Australia, the power to regulate rail networks is shared by the Commonwealth (delegated to the ACCC) and the States. Under the direction of the COAG, a national system of rail access regulation using the ARTC access undertaking as a model is under development.

#### *Airports – Is Economic Regulation Necessary?*

There is considerable variation in the regulatory regimes applied to airports in the benchmark countries, although each country regulates air safety and air traffic management services. The recently adopted *EU Directive on Airport Charges* will provide for a degree of consistency in regulatory approach in Member States. The Directive requires transparency, consultation and the application of the principle of non-discrimination when setting airport charges (it does not, however, require a common charging system). Only the largest airport in each Member State, and other airports with annual traffic of more than five million passengers, are subject to the charging principles. The Directive also requires the establishment of an independent national regulator to monitor airport charges and the creation of a dispute resolution mechanism. The Directive must be implemented by Member States by March 2011

Most benchmark countries apply some form of *ex ante* access price regulation to major airports, reflecting concerns about the incumbent's incentives to exploit market

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<sup>25</sup> Productivity Commission, *Road and Rail Freight Infrastructure Pricing*, Inquiry Report No. 41, 22 December 2006, pp. xxvi - lxii.

power. However, in some countries, notably Canada and New Zealand, there is currently limited *ex ante* regulation of airport charges. In New Zealand, this has reflected a view that an airport's market power is effectively constrained by large airport users, the need to earn non-aeronautical revenue, and the threat of re-regulation if charges are excessive. A recent review of airport regulation has, however, challenged this view. Accordingly, changes to the regulatory regime are to be implemented to strengthen the constraint imposed by regulation. It is not proposed, however, that airport charges will be directly regulated.

In France, individual public airports (those of a certain size or of national importance) are required to draw up an economic regulation contract with the government. This contract sets out price and quality objectives to be met by the airport for a period of up to five years. The contract is developed under a public process and is subject to ministerial approval.

Economic regulation may also be imposed on ground-handling services and other airport-related services to ensure competitive provision of these services. A 1996 EU Directive requires the full opening of access to the ground-handling market (with the exceptions of certain services – handling baggage, ramp, fuel and oil, and freight and mail between the terminal and the aircraft – which are subject to reduced requirements) at airports meeting certain criteria. This Directive is reported to have introduced competition and thus lower prices, to various degrees, at the EU airports.<sup>26</sup>

Australia, like Canada and New Zealand, has taken a relatively *laissez-faire* approach to airport regulation. With the exception of declared regional services at Sydney Airport, Australian airports are free to determine their own prices, subject only to the potential application of an access regime if the prices are not consistent with specified 'Aeronautical Pricing Principles'. The airport sector is however monitored by the ACCC in relation to certain aeronautical and non-aeronautical services at certain airports. Restrictions also exist on airline ownership and co-ownership of certain airports.

#### *Ports – Is Economic Regulation Justified?*

There is little history of economic regulation of ports in most benchmark countries. The resistance to economic regulation of ports may in part reflect a belief that such regulation is not warranted because there is no market failure to address: existing providers are already competitive and efficient. Alternatively, the costs of regulation may exceed the benefits having regard to the economic significance of a particular port.

At the EU level there has been considerable discussion and disagreement about the need for regulation of port services. Draft Directives issued in 2001 and 2004 would have allowed competition in the provision of such port services as pilotage, towage and stevedoring. However, the Directives failed and there is currently no common European regulatory framework for such services. A new European Port Policy consultation commenced in 2006-07 but in recognition of likely resistance to establishing any framework for port tariffs based on costs, the proposals relate only to the introduction of transparency in charging methodology and tariff structures. In addition, such arrangements will only apply to towage services.

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<sup>26</sup> European Commission, *Report from the Commission on the Application of Council Directive 96/97/EC of 15 October 1996*, COM(2006) 821, Brussels, 24 January 2007, p. 10.

Port regulation has also been considered at times at the national level. A 2003 report commissioned by the Irish Department of Communications, Marine and Natural Resources, reviewed the system of port governance in Ireland. During consultation, concerns were raised that the process of rate setting by port companies was not sufficiently transparent. However, the report concluded that there was no need for an independent regulator, and there continues to be no economic regulation of ports in Ireland.

In the EU context, the potential for competition may alleviate concerns that could otherwise arise in countries such as the Netherlands that are highly dependent on sea trade. The absence of regulation across the European countries – and in New Zealand – may reflect a greater degree of competition between ports in those places.

North American arrangements differ between the US and Canada. In the US, the FMC acts as an industry-specific competition regulator for ports and shipping. It is not a traditional utility ‘regulator’ as such. In Canada, major ports are operated by port authorities and regulated by the independent federal transport regulator – Canadian Transportation Agency (CTA) – with quite conventional process applied to fee variations. Lesser ports – known as ‘public ports’ – are subject to Ministerial regulation and the rules of the *User Fees Act* that applies to all Canadian public authorities.

In Japan, ports and harbours are locally managed but centrally controlled. As in other areas of infrastructure provision in Japan, there is a strong role for the national government in the funding and operation of ports and harbours. There are no apparent criteria for the designation of ‘major ports,’ this being an important designation because of the funding implications involved. Further, process issues do not appear to arise with respect to the setting of fees for port services, as these also appear to be centrally determined. The Netherlands also has central funding arrangements for the interface between ports and road and rail transport.

The regulatory arrangements for ports and port-related services in Australia are amongst the most highly developed in the benchmark countries, perhaps reflecting the critical reliance of the Australian economy on sea trade (particularly related to exports of bulky raw materials) and the view that some Australian ports are ‘bottlenecks’ for resource exports. There is also limited scope for competition between ports because of Australia’s geography. Unlike other countries, stevedoring services in Australia are subject to a price surveillance regime under which the ACCC is required to monitor, and report annually on, prices, costs and profits relating to the supply of services by stevedoring companies at the ports of Adelaide, Brisbane, Burnie, Fremantle, Melbourne and Sydney.

### ***Possible Implications for Australian Regulatory Design***

Regulatory design features for infrastructure where responsibility is shared between levels of government in a federation, like Canada, Germany and the US, may be relevant for Australia and its COAG processes. Analogously, if the EU is viewed as a large ‘federation’, this may also give rise to potentially relevant considerations for the Australian context.

To date the EU’s processes of developing a consistent approach to the regulation of a unified European market and national markets have had mixed success and there is evidence of delays in implementation and resistance to change in some areas, with



strong positive results in posts;<sup>27</sup> satisfactory results in energy and telecommunications; uneven progress in water and wastewater and in rail; and no apparent influence in airports and ports. Despite the essentially political problems confronting the EU processes, the success of those processes in some sectors provide insights into the benefits of developing consistent regulatory approaches across previously disparate regimes.

A number of aspects of regulatory design in the benchmark countries are of potential interest for Australia.

In energy and telecommunications, the benchmark countries typically show features of advanced regulatory design. Economic regulatory arrangements tend to be sophisticated and the processes relatively transparent and consultative. In the presence of rapid technological progress in telecommunications, the industry is continuously reviewed in an attempt to ensure that the most appropriate form of regulation is in place.

In posts, the EU process towards postal liberalisation is interesting, but arrangements in place in European Member States in the circumstances of a developing European postal market may be less appropriate in Australia given its relatively small market size and its geographical isolation from potential competitors.

In water and wastewater, there is a tendency towards an integrated river basin-wide approach to water management. While this approach has also long been recognised in Australia, particularly in the development of the MDB, the states are primarily responsible for regulating water and wastewater, as a utility, in all urban areas and rural areas outside the MDB. The emerging approach at both the utility and basin levels in Australia is in line with international best practice.

In rail, regulatory regimes vary considerably across benchmark countries. There is however a trend toward greater independence for the regulator and toward regulation of a broader number of transport segments to reflect increasing competition with, and integration into, other modes of transportation). Of particular interest to Australia as a federation is the role in benchmark countries of sub-national governments in rail regulation. In the US, rail regulation is administered federally by the STB, accompanied by regulatory authorities at the state level. Nevertheless, it is important to have a nationally-consistent approach to rail regulation. To this end, the development of a national system of rail access, like the ARTC access undertaking centrally administered by the ACCC, is important.

In airports, there is also considerable variation in the regulatory regimes across the benchmark countries. While in some countries airports are largely unregulated, in other countries economic regulation of airports applies to major airports that may potentially have market power. Debates over the necessity of economic regulation in the industry arise reflecting further debate as to the presence of market power by the airports and whether there is any countervailing power held by the airlines. The Australian approach tends to be relatively *laissez-faire*.

In ports, there is little history of economic regulation in most benchmark countries. The absence of economic regulation may, in part, reflect competition in the provision of port and port-related services. The tendency towards transport-wide regulation is

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<sup>27</sup> Outside of Europe, postal regulation displays the greatest diversity of regulatory arrangements and approach of any of the infrastructure areas covered in this research.

relevant for Australia given the strategic importance of sea-ports in exporting the country's bulk raw material. Consequently, the ACCC and other authorities may become more involved in identifying and addressing bottlenecks in the transport supply chain across ports, road, rail and airports.

## 4. Institutional Structures for Better Regulation

There are different responses to common issues and questions about institutional design across the benchmark countries, suggesting that there may not be a ‘one size fits all’ institutional structure that best promotes competition in any particular setting. However, an assessment of how benchmark countries have responded to the key issues and questions may provide some insights. This chapter considers how benchmark countries have responded to the following key issues and questions about institutional design:

- Separation of competition law enforcement from regulatory responsibilities
- Industry-specific or sector-specific versus multi-sector regulators
- Role of sub-national economic regulation
- Public governance arrangements of regulatory agencies.

### *Separation of Competition Law Enforcement from Regulatory Responsibilities*

Most benchmark countries have regulators responsible for the economic regulation of specific sectors or industries, and for competition matters relevant to those industries, as well as separate organisations to enforce general competition law. The exceptions are Australia and New Zealand where the ACCC and the NZCC, respectively, are the competition law enforcement agencies as well as principal economic regulators. Similarly, the NMa in the Netherlands is a competition authority but also retains economic regulatory functions for energy and transport (post and telecommunications are regulated by a separate organisation).

While the majority of the benchmark countries have one national competition authority, in both the UK and US there are two agencies that share key responsibility for enforcement of competition laws. In the UK, the Office of Fair Trading (OFT) is the principal enforcement body for competition law (including EC Competition Law in the UK) and is also responsible for consumer protection. The UKCC also has a role in deciding substantial economic questions regarding mergers, market and regulated sectors. It acts on regulatory references from other authorities (e.g. OFT, the Secretary of State, or a sector regulator) and hears appeals in relation to price controls or modifications to licence terms.

The US antitrust laws are administered by the Federal Trade Commission’s (FTC) Bureau of Competition and the Antitrust Division of the Department of Justice (DoJ). The DoJ and the FTC have concurrent power and jurisdiction and generally divide their enforcement roles by industry. There are no formal procedures to guide a decision as to which agency will investigate a particular matter. A decision as to whether the FTC or the DoJ will investigate a matter where there are concurrent powers and jurisdiction is made following significant discussion and negotiation between the agencies – the agencies effectively compete for cases.<sup>28</sup> Some commentators suggest that this competition for cases makes investigations more efficient.

The separation of competition law enforcement and regulatory responsibilities into separate agencies has necessitated procedures to be put into place in some countries to

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<sup>28</sup> Here it should be noted that for market abuse cases the DOJ can institute criminal proceedings while the FTC can only take civil action.

deal with situations where enforcement and regulatory responsibilities overlap or are duplicated. The US seems to have relatively weak procedures for streamlining concurrent processes. Most US economic regulators have powers to enforce competition law within their industry areas, including powers to approve mergers. Potentially regulatory and antitrust agencies might concurrently conduct their own investigations and, in some instances, a matter may require approval from all relevant agencies before being allowed to proceed. In addition, US state regulators are involved in competition law matters and in some states, merger proposals must also be approved by the regulator and the state attorney general.

In Japan, coordination between the Japan Fair Trade Commission (JFTC) and the relevant industry regulators has also been largely informal although the regulator is required to conduct sufficient prior consultation with the JFTC when issuing or amending administrative guidance.

At the opposite end of the spectrum, the UK has quite sophisticated procedures in place to deal with situations where concurrent power and jurisdiction arises between the OFT and a regulator. The *Competition Act 1998 (Concurrency) Regulations 2004* set out the collaborative framework under which the concurrent powers are exercised. In practice, the OFT has issued Concurrency Guidelines to assist with determination of the body best placed to deal with a concurrent matter. In addition, the OFT and each concurrent regulator is represented on the Concurrency Working Party, chaired by the OFT, which is formed to coordinate a consistent approach to enforcement of competition law. A Joint Regulators group operates to promote consistency.

In Ireland, the sector-specific or industry-specific regulators (the Commission for Energy Regulation (CER), the ComReg and the Commission for Aviation Regulation (CAR)) have implemented co-operation agreements with the Irish Competition Authority. These provide for exchange of information and guidance in situations in which both bodies are able to exercise their regulatory functions. Similarly, in New Zealand, where the NZCC's role meets or overlaps that of another regulatory agency, the agencies may enter into a Memorandum of Understanding that outlines their respective roles and jurisdictions.

### ***Industry-specific versus Multi-industry Regulators***

The institutional arrangements for regulatory authorities also vary across countries. Several benchmark countries have national regulatory agencies separated from the responsible ministries, and the regulatory agencies may be organised in one of the following institutional forms – a single regulator with across-the-board regulatory responsibility; a national competition authority with regulatory responsibilities over certain sectors; independent regulators specific to an industry or specific to a sector.

In Germany the FNA is primarily responsible for economic regulation of gas, electricity, rail, post and telecommunications services. However, decision-making authority does not reside with a single body. Instead, nine determinative bodies, called Ruling Chambers, are organised along industry and activities lines. Each Ruling Chamber makes decisions autonomously from the rest of the organisation for matters within its jurisdiction although informal consultation may occur. In this regard, the German regulatory decision-making process has some of the characteristics of industry-specific regulation. According to the FNA, this structural design allows for a greater focus on specialisation and a close relationship between the Ruling Chambers and the specific activities being regulated.

In the Netherlands, the NMa is responsible for the enforcement of competition law and the regulation of network activities in energy and transport, although as in Germany, these are administered through separate Offices. A separate regulator for post and telecommunications (the OPTA) is the other main regulatory body.

Economic regulation in New Zealand is primarily the responsibility of the national competition authority – NZCC. However, it shares responsibility for regulation of electricity with the Electricity Commission which has been constituted under the *Electricity Governance Regulations 2003*. In addition, a separate body, the Rulings Panel, has been set up to deal with dispute resolution and enforcement of New Zealand's electricity rules and regulations. The New Zealand regulatory arrangements for telecommunications are unique across the benchmark countries. Under the *Telecommunications Act*, a Telecommunications Commissioner is appointed by the Governor General as a member of the NZCC and may decide certain matters. New Zealand's postal services are regulated by the Ministry of Economic Development through a *Deed of Understanding* between New Zealand Post and the Crown.

In contrast, in the remaining benchmark countries, economic regulation is primarily undertaken by industry-specific or sector-specific regulators. For example, in the UK, there are separate national regulators for telecommunications, energy, water and wastewater, rail and airports. The Joint Regulators' Group (JRG) was formed for the heads of the regulators to meet four times a year to discuss issues of mutual concern and to report on recent developments in their own regulated sectors. In Sweden and Canada there are four industry-specific national regulators. Sometimes, however, a regulator has responsibility for the economic regulation of two or more industries – for example, it is not unusual for benchmark countries to have a communications-wide regulator, an energy-wide regulator or a transport-wide regulator.

In the US, regulation also tends to be organised on an industry- or sector-specific basis, but with an unusual split – by the standards of most other benchmark countries – between national and state level regulation. The US structure is particularly complex. In energy, regulation at the national level (where it involves inter-state trade) is conducted by the FERC, but state public utility commissions also play a role. Responsibility for telecommunications regulation is split between the FCC and the state public utility commissions (PUCs). The PRC is the dedicated regulator for the postal industry and for airports, the Department of Transport is authorised to review under certain conditions the reasonableness of airport fees charged. Port regulation comes under the FMC.

### ***Role of the Sub-national Economic Regulators***

In each of the benchmark countries, sub-national economic regulators have an important role in the regulation of water and wastewater and ports. Sub-national economic regulators may also have a role in regulating the distribution and retail segments of energy markets. For example, while the NEB regulates inter-province gas pipelines, energy development and national and international trade; the economic regulation of intra-provincial energy producers and providers is the responsibility of provincial regulators. In Germany, state authorities regulate retail prices in energy unless the prices are levied nationwide. In addition, although legislative, policy and supervisory functions in relation to German airports are vested in the relevant federal Minister, administrative and economic regulatory responsibilities for those airports are significantly devolved to the State transport ministries.

In the US, economic regulatory responsibility for energy, telecommunications and transport is split between the respective federal agency and the state PUCs. For example, powers and responsibilities over telecommunications services may vary somewhat across the states but broadly the FCC is responsible for interstate and international communications while the PUCs are responsible for intra-state communications services.

### *Governance Arrangements*

The benchmark countries' regulatory agencies are covered by a wide variety of public governance arrangements which differ in terms of the degree of separation of regulation from public policy, the independence of the regulator, and the internal governance arrangements of the regulator.

#### *Separation of Regulation, Policy and Rule-making*

The extent to which regulation, policy and rule making is separated varies across the benchmark countries.

In New Zealand, as in Australia, the three functions are generally performed by two separate entities. The NZCC has a recommendatory role in relation to the application of price control to an industry. However, the Minister has ultimate decision-making responsibility for applying that control. In telecommunications, for example, the NZCC recommends to the Minister which services should be regulated and the form that such regulation should take.

Most regulatory bodies do not have a role in policy formulation. However, the French rail regulator (MCAF) has an advisory role to the Minister for Transport and is charged with providing advice on network access complaints and monitoring network access conditions. Similarly the ARCEP and Energy Regulation Commission (CRE) may be consulted for opinions on draft legislation, decrees and regulations concerning posts and telecommunications. In Sweden, the rail regulator (now part of the JTA) acts as an adviser to the Minister with respect to the national position for EU discussions and international relations.

Some regulators across the benchmark countries have a role in rule-making. For instance, in the US, the PRC is required to establish a modern system of rate and mail class regulation for postal services and the STB is authorised to formulate regulations. Likewise, in Sweden, the newly-established JTA is responsible for drawing up regulations in relation to the rail and airport sectors.

#### *Regulatory Independence*

In countries such as France and Japan regulation is subject to ministerial directions. Regulation of French infrastructure is the responsibility of the relevant Minister who has ultimate decision-making power. The regulators have an advisory role only in relation to many activities including price regulation. However, regulators of energy, posts and telecommunications are able to resolve disputes regarding access and the creation of access contracts (although the Minister has final decision-making power in relation to access disputes in French rail). Similarly, in Japan economic regulation is mainly carried out by agencies within key ministries such as the Ministry of Economy, Trade and Industry (METI), the MLIT and the MIC.

In the other benchmark countries, regulatory bodies are independent of the government, and have ultimate decision-making responsibility for matters within their jurisdiction. In general, regulators are also independent of the companies that they

regulate but this was not always the case. For example, in Sweden, the airport and rail sectors were historically regulated by the respective incumbent infrastructure manager.

National regulatory bodies in the UK are independent of the government, but may have a broad remit which extends beyond economic regulation. For example, the Ofgem is independent of the UK government, while at the same time having a general duty to have regard to the Government's social and environmental policies, including addressing fuel poverty, curbing climate change, and considering the needs of vulnerable consumers. The Secretary of State may give the Ofgem guidance as to the contribution that the Ofgem should make to the attainment of those policies. Similarly, the Ofwat, the UK water regulator, has a general duty to consider sustainable development and the environment but does not appear to be subject to Ministerial guidance in the same way as the Ofgem. The ORR has a range of statutory duties in performing safety and economic regulation, as well as promoting competition. In Ireland, the CER is legally required to promote renewable energy forms.

#### *Governance within the Regulator*

In benchmark countries where the regulator is independent of government, decision making is usually the responsibility of a board or commission comprising appointed members. The number of members appointed varies. For example, despite the size of the US economy and regulated infrastructure industries, only five commissioners are appointed to the FTC, the FERC, the FCC, and the PRC. Only three members are appointed to the STB and the FMC. In contrast, the much smaller Canadian telecommunications industry is regulated by a Commission comprised of up to 13 full time and six part-time commissioners. Another six temporary members may also be appointed, although only full-time commissioners are involved in decision making. In general, the size of most regulatory decision-making bodies seems to fall within the range of five to seven members.

In Germany, decision-making power resides with the nine Ruling Chambers rather than the President and Vice President of the FNA. The primary functions of the latter are to liaise with the public and media and oversee the functions of the various departments. Similarly, the New Zealand Telecommunications Commissioner, acting alone, has power to decide certain matters.

Sometimes, decision-making power is delegated by the governing body (see chapter 5 for details). In the US, decision-making power is sometimes delegated to staff of regulatory agencies. However, staff decisions are reviewable by the regulator's board. In the Netherlands, the two sector-specific regulators within the NMa may determine some low-profile matters.

Some of the benchmark countries have arrangements governing member appointments that appear to be intended to foster cooperation between various levels or sides of government and/or to reduce the potential for political bias in decision making. For example, appointments to the NZCC are made by the Governor-General on advice from the relevant Minister. Associate members of the NZCC, and members of the Electricity Commission, may be appointed by the Minister. Members of the Ruling Panel are appointed by the Electricity Commission. At least one member must be a barrister or solicitor. Appointments to the Japanese TBDSC are made by the Minister of the MIC with consent from both houses of the Japanese parliament.

Political bipartisanship and independence is achieved in the regulation of French telecommunications and posts by splitting responsibility for appointing members to the ARCEP between the President of the Republic, the President of the National Assembly and the President of the Senate. In addition, board members cannot be dismissed and their six-year mandate is not renewable.

In the US, appointments to the Federal regulatory agencies are made by the President after approval from the Senate. In order to prevent political bias, no more than three of the five commissioners appointed to the agency (e.g. the FERC, the FCC and the PRC) may belong to the same political party.

### ***Overview of Institutional Arrangements in Benchmark Countries***

The review of benchmark countries reveals a variety of institutional arrangements, usually influenced by a range of structural factors, such as the size of the country's economy and its stage of market and regulatory development.

The US model is the most complex organisational structure (hardly surprising given a population in excess of 300 million and long history of involvement in infrastructure regulation). Both national and state regulators may be involved with merger issues, and there is a certain level of overlap between the functions of a regulator and the FTC and the DoJ – most national US economic regulators have competition law powers under their enabling legislation. Regulators at all levels use their depth of industry knowledge to provide policy advice and information to the community about industry trends. Because communication and energy utilities have some state-level oversight, the activities of the FCC and the FERC are closely monitored and state regulators participate in the FCC and the FERC proceedings through intervention and the filing of comments.

In this robustly competitive system where jurisdictions are cut in a range of different ways, some cases/decisions are the province of one regulator, others occur across regulators and still others are competed for (between the DoJ and the FTC). Compared with other benchmark countries, the US model is at the extreme of the spectrum with regard to its level of disaggregation.

The UK structure is also made-up of a diversity of institutions encompassing industry or sectoral-specific regulators, the OFT (applying and enforcing competition law) and the Competition Commission (dealing not only with merger inquiries but references and appeals). There is also a strong emphasis on industry specialisation and expertise.

Whilst the flow of actual work indicates a more amorphous structure, there appears to be much more emphasis in the UK system upon coordination with concurrency guidelines (issued by the OFT), committees (e.g. joint regulators group) and conventions (e.g. Concurrency Working Party) in place to impose a certain type of order. Also the UK Competition Commission operates as a reference body to deal with substantive economic questions including on regulatory references for price controls. References come from a range of sources including the OFT and the industry regulators. The Competition Appeal Tribunal (CAT), a specialist independent Tribunal set up in 2003 to hear appeals, is increasingly becoming a single specialist forum for appeals for regulatory decisions and against actions taken by the regulator under competition law.

In the German model the stand-out characteristics of the FNA seem to be the compartmentalisation of regulatory areas and functions and the separate decision-making structure. The six regulatory divisions are divided by both industry and



function into tightly scoped areas of activity. The nine Ruling Chambers are organised according to different industries or sectors and also according to specific activities. Each of the Ruling Chambers has complete autonomy to manage and decide matters within its remit. There is no formal requirement for one ruling Chamber to review, or even view, the decisions of other Ruling Chambers. In a highly controversial decision, the President of the FNA will typically be notified but not intervene. The system places great weight on a sophisticated understanding of a specialist area of activity while agency-wide coordination and consistency appear to be given less weight.

The smaller economies of Sweden, the Netherlands, Ireland and New Zealand are undergoing significant regulatory development. Industry-specific Directives from the EU have clearly impacted upon regulatory design in Ireland, Sweden and the Netherlands, but variations in application can be observed. New Zealand is undertaking significant change to its arrangements for the economic regulation of infrastructure.

The Irish Competition Authority has overlapping functions with the regulators for energy, communications and airports, and co-operation agreements to provide guidance about which party should have priority in exercising particular regulatory functions. The Swedish Competition Authority coexists with separate industry and sectoral regulators. The distinctiveness of Sweden is not only in the public procurement role of the Competition Authority but also in the depth and range of its three consumer authorities.

Like Australia, both the Netherlands and New Zealand have a national competition authority that also retains responsibility for economic regulation in some sectors. In the case of the Netherlands, two offices in the NMa are responsible for the regulation of energy and transport respectively. However, unlike Australia, a separate authority is responsible for the economic regulation (but not competition law enforcement) for telecommunications and post. In the case of New Zealand, the NZCC acts as the economic regulator of infrastructure (electricity and telecommunications) although the role in regulating electricity is shared with a separate body, the Electricity Commission.

Canada, a middle-size economy, has been influenced by its proximity to the US and the Canadian state and federal divide impacts on the institutional structure. Japan and France are different again, with a less well developed pattern of independent regulation.

### ***The Australian Institutional Structure***

The inquiry into NCP (the Hilmer Review) had to deliberate on an institutional structure that would best fit Australian needs. A structure was needed that would minimise the costs of regulation in terms of both compliance costs and the risk of regulatory error. The strengths and weaknesses of various regulatory options were much discussed. Given the different requirements of competition law enforcement, consumer protection, economic regulation and technical regulation, a number of models seemed possible, including to:

- combine technical and economic regulation in an industry-specific or sector-specific regulator, and leave competition law enforcement entirely in the hands of the competition agency;

- organise technical regulation as a stand-alone function, and include economic regulation within the competition agency; or
- combine technical and economic regulation in an industry-specific or sector-specific regulator, and give it all or some competition law enforcement functions.

Of these three broad models, Australia has, in effect embarked upon a model that is nearest to the second alternative, with the establishment of an independent statutory authority – the ACCC – with economy-wide responsibility for national economic regulation in addition to competition law and consumer protection. However, state variations to the overall scheme do occur. Technical regulation is, on the whole, the responsibility of a range of separate bodies. Over time the ACCC model has been adjusted, particularly with the formation of the AER in 2005.

At present, economic regulation in Australia is primarily the responsibility of the ACCC and the AER. The ACCC is the multi-industry regulator of telecommunications, water, rail, postal services and airports. It also has a potential regulatory role in other areas that are subject to the generic access regime under Part IIIA of the *Trade Practices Act* and the generic prices surveillance regime under Part VIIA of that Act. The functions of other regulatory bodies, especially those of the Australian Communication and Media Authority (ACMA), impact on the role of the ACCC.<sup>29</sup> The AER is a part of the ACCC and is responsible for regulation of electricity and gas. The AER with the National Electricity Market Management Company (NEMMCO) has a limited role in the technical regulation of electricity.

As a federation, states in Australia play a role in the regulation of energy, water and wastewater, rail and ports. The establishment of the AER was intended to prevent distortions – a national energy market needs regulation undertaken on a national basis. As a consequence, regulatory powers moved from the states to the AER. Part of the Australian competition reform process has been about the development of national rather than state markets and the attempt to develop national markets has called for national economic regulation (for energy) or an attempt to achieve some level of uniformity between the states for other areas of regulation (ports for example). Rail sits somewhere between these two approaches for, while there is national regulation for interstate rail track services, the states have their own regulatory regimes for intra-state services and, even for safety regulations, uniformity has not been achieved.

In Australia, the regulatory function and the public policy function are generally performed by separate bodies. For example, the Minister has ultimate decision-making power to ‘declare’ a service subject to the generic access regime in Part IIIA of the *Trade Practices Act*, upon advice from the National Competition Council. The ACCC is then responsible for administering the declaration. In contrast, the ACCC is responsible for deciding which services should be ‘declared’ for regulation in telecommunications as well as administering the declaration. With respect to water matters, the ACCC has an advisory role to the Minister for Climate Change and Water on the development of water market rules and water charge rules, and an advisory role to the Murray-Darling Basin Authority on water trading rules. Although the ACCC and the AER can advise government in some situations, the policy function is performed by separate government departments.

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<sup>29</sup> Both the ACMA and the ACCC are required to report to the relevant Minister on the performance of the telecommunications industry and the two organisations work together to streamline and coordinate industry data collection and have more recently produced a joint report on service availability.

Both the ACCC and the AER are multi-member, independent bodies that have ultimate decision-making responsibility for matters within their jurisdiction. The Chairperson and members of the ACCC are appointed by the Governor General on advice from the Commonwealth minister who must be satisfied that the appointee has the support of the majority of states/territories. The AER Board comprises a Chair, a Commonwealth member (selected from the ACCC) and a state/territory member who may be part-time.

### *Insights for the Australian Institutional Structure*

The contrast that is most apparent between Australia and the other benchmark countries is the Australian one-institution approach and therefore the concentration of decision making in one organisation – the ACCC and its Commissioners. The one-institutional model adopted has many advantages – a pro-competitive approach to regulation, a focus on an integrated and consistent approach to regulation across industries and sectors and economies of scope – all appear to be important for the country. On this ground, the AER was set up as part of the ACCC to retain these advantages. However, the AER does have a separate legal identity with its own board of three members (one member is selected from ACCC commissioners).

The Australian system was purposefully designed and built rather than evolved – it flowed from the NCP specification. Australia came to utility regulation rather late because its utilities were almost exclusively state owned and corporatisation did not commence until the government business enterprise (GBE) reforms in the late 1980s necessitated the establishment of independent regulators. The Hilmer review was built on the acceptance that Australia's economic performance had to be improved and an essential part of that improvement had to come from utility industries. In contrast, the complex American model started from a systematic reform process, but subsequently evolved over time incorporating a range of additions, subtractions, rethinking and restructuring.

Economic size is also an influencing factor. Australia is a very small economy in terms of the size of economic activities compared to the US and a relatively small economy compared to, for example, the UK and Germany. These countries have much more complex organisational structures. To date it has been possible for Australia to cover the diversity of functions in one organisation that employs around 700. The Australian institutional structure was explicitly driven by costs. It was considered that in a relatively small economy the analytical and specialist skills of staff were best pooled. However, as smaller economies than Australia have adopted a multi-agency approach to regulation, the size of the economy is not the dominant influence on the institutional structure used for economic regulation and the enforcement of competition law.

Nevertheless, in terms of both the diversity of decisions that Commissioners have to oversight and the impact of decisions, the Australian model is an extraordinary contrast even when compared with much smaller benchmark countries.

The great advantage of such concentration is the Hilmer rationale; the one-institution approach can encourage a pro-competitive focus across the spectrum of regulatory, consumer protection merger and competition law decisions. Separate economic regulatory agencies are in danger of taking a 'regulation-forever' approach. In contrast, when a single agency combines the responsibility for the administration of competition law with economic regulation there may be a greater willingness to wind

down economic regulation as competition becomes stronger. In addition, there has always been a concern that separate industry regulators are at risk of identifying too closely with the industry they oversight.<sup>30</sup> If they also have other roles, research and information provision for example, there is danger that they may become advocates for the industry.

In the current discussions regarding the global credit crisis questions are being asked across the world about the appropriate role and functions of competition policy and regulation. In this respect, the ACCC/AER appears well placed to highlight to the community the complementary nature of this work – to explain the paradox that for some markets increased competition can only be achieved with increased regulation (where for example access regulation may be required). Explaining the focus on competition, the limitations of competition and the reliance on regulation can be more coherently achieved by an organisation that administers both competition law and economic regulation.

Consistency is seen as another rationale for the one-institution approach. While all infrastructure industries have unique features, many of the economic regulation issues raised are similar across a range of regulated industries. As all industries compete for investment capital, inconsistent approaches to issues such as the valuation of capital could lead to distortions and inefficient investment. Australia has a history of separate state regulation that may have inhibited the creation of national markets and distorted investment. In this context a concern for consistency in regulation was strongly linked with the objective of increasing allocative efficiency and productivity. In addition, the one-institution approach may reduce the risk of duplication in sectoral regulation and enhance the synergy in regulatory practice.

Other benchmark countries seem either to have tried to capture these objectives in other ways or to put less weight upon them. For example, industry regulators in the UK and US have roles in applying competition law when it is specific to the industry or sector. The UK uses a range of organisational structures in seeking the achievement of consistency. Alternatively, competition rather than coordination between regulators seems to be a hallmark of the US system, and the German system appears to be built on a quite different rationale.

While the argument for a consistent approach across areas has a strong economic rationale, it is also possible that the consistency achieved in the one-institution approach may come at the cost of agency-specific experimentation that allows new ideas to be tested and applied more broadly. The UK provides an example of this – recently the ‘constructive engagement approach’,<sup>31</sup> first used in UK airports, has come to be considered more broadly (for example, by the Ofgem as part of its RPI-X@20 review).

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<sup>30</sup> The original ‘capture theory’ was suggested by George Stigler in the 1960s – see, in particular, G.J. Stigler, ‘The Economic Theory of Regulation’, *Bell Journal of Economics*, 2, 1971, pp. 3–21.

<sup>31</sup> See Nick Fincham and Simon Oates, ‘Airport Regulation – The Process of Constructive Engagement’, *Presentation* at Industry Seminar, 16 June 2005, Available at: [http://www.caa.co.uk/docs/5/ergdocs/erg\\_ercp\\_airportpresentation\\_june05.pdf](http://www.caa.co.uk/docs/5/ergdocs/erg_ercp_airportpresentation_june05.pdf) [accessed on 14 December 2008] and Stephen Littlechild, *Constructive Engagement and Negotiated Settlements – A Prospect in the England and Wales Water Sector?*, 29 August 2008, Available at: <http://www.eprg.group.cam.ac.uk/wp-content/uploads/2008/11/negotiatedsettlementsew29aug08.pdf> [accessed on 14 December 2008].

Of course there may be other consequences for Australia of the one-institution structure. Given the concentration of decision making within the Commission, the ACCC has even more reason than the other benchmark organisations to maintain and justify its independence from government and other outside influences. This has consequences for its role in policy debates. As has been argued elsewhere

the agency with experience in administering legislation invariably has valuable knowledge of the legislative shortcomings and is well-placed to suggest improvements.<sup>32</sup>

The ACCC is certainly given a unique role to gain insight to the impact of regulation and to the various workings of the economy. However, it is constrained in how vocal it can be as a participant in public debate. Advice is provided in private to government, and arguments for legislative change can be made in submissions to reviews – by the PC for example – that are in the public domain. Nevertheless, this is a particularly sensitive area, and robust public debate initiated by an industry or sectoral regulator that could occur in the US (where there are likely to be other countervailing regulatory influences) is less likely to be an option for the ACCC.

With such a concentration of decision making within the one organisation, a mistake in one area (accidentally releasing confidential information for example) or an adverse Tribunal decision, can have consequences across the decision-making spectrum. A failure to make headway in a difficult area like petrol prices may cause the ACCC to lose standing across the board. It follows that a loss in public confidence in the ACCC will potentially have a much bigger impact in Australia compared with say a set-back for an industry regulator in the UK.

This means that pressure on the ACCC and its Commissioners is likely to be unremitting instead of being diffused over a number of organisations and their commissioners or board members. It is difficult to imagine that this would not have some consequences – perhaps a preference to stay in the middle and to make incremental decisions. Alternatively, it is also likely further to encourage a commitment to consult widely and to test decisions fully before they are finalised.

Despite the potential disadvantages of the one-institution model, its associated advantages of coherency and consistency have caused it to be the preferred model to date in Australia. Nevertheless, there may be some upward size constraints that limit the practicality of the Australian model as economic regulation becomes even more technical, and as the complexity and diversity of communications and energy increases.

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<sup>32</sup> Rod Shogren, ‘Implementing an Effective Competition Policy: Skills and Synergies’, in E.M. Medalla (ed) *Competition Policy in East Asia*, Routledge, Oxford, 2005, pp. 41–60; p. 51.



## 5. Consultation, Timeliness and Decision Making

This chapter focuses on three aspects of regulatory processes across the benchmark countries: consultation, timeliness and decision making. The approaches used in Australia with respect to these aspects are then reviewed. Finally consideration is given to aspects of practice observed across the benchmark countries that may be of relevance to Australia.

### *Consultation*

Consultation about regulatory arrangements is one way in which the interests of all stakeholders can be taken into account in regulatory decision making. It also helps improve the transparency of regulatory decision making. However, consultation can also lengthen the time taken to reach a regulatory decision and, thus, it may be appropriate to consider how these countervailing factors interact.

### *Requirements to Consult*

Regulators in most benchmark countries have statutory duties to consult. In some instances, EU legislation impacts on the consultation requirements of Member States. For example, the EU *Framework Directive on Electronic Communications* requires national regulatory agencies in Member States to consult with relevant parties during their decision-making process. In addition, the European Commission (EC) itself may consult with interested parties where it has serious doubts about a measure proposed by a national regulatory authority (NRA) in that industry or sector. The EC also ‘consults’ in developing the Directives and Regulations that shape national regulatory arrangements. However, consultation is with Member States rather than regulated entities and, because of the political nature of the EU, the process appears to be less consultation than ‘consensus building’.

It is important to note, however, that all EU Directives contain only high-level objectives, and it is for Member States to determine the specifics of implementation. Accordingly, there can be significant variations observed, even across those Member States that have transposed the relevant Directives into national legislation, as to how consultation requirements are met. In this regard, in Ireland, public consultation is required by law in the energy, post and airport industries. In the UK, the Ofgem has statutory duties to consult when exercising its statutory powers.

In New Zealand and North America, consultation forms part of the decision-making practice of regulators in a number of regulated areas. It also plays a role in telecommunications regulation in Japan.

### *Nature of Public Consultation*

Across the benchmark countries, public consultation in regulatory processes most commonly takes the form of an opportunity for the various stakeholders to make submissions in response to draft decisions, regulatory applications, issue papers or consultation documents. Consultation may also occur through a right or opportunity to participate in an oral hearing. Depending on the issues to consult on, the stakeholders may include infrastructure owners, access seekers, end users, or other interested parties.

Consultation may occur through formal or informal mechanisms or a combination of the two. For example, in the UK, the Ofwat’s consultation process in determining access disputes can involve the publication of a consultation paper, as well as

workshops, seminars and meetings with interested parties. Some regulators conduct additional consultation outside formal consultation timelines. For example, the Ofcom engages in pre-consultation with stakeholders to ensure that it has a clear understanding of the issues before commencing a formal consultation process. Similarly, Ireland's CER publishes a consultation paper only after holding discussion meetings (and sometimes an open hearing) with regulated entities and interested parties.

Consultation levels can vary substantially in dispute settlement processes. In some benchmark countries, for instance, such processes may be conducted privately through ADR processes. Alternatively, participation in such processes may be restricted to those who can establish a relevant interest or stake in the decision.

The UK presents a mixed picture as regards consultation processes in dispute settlement. The Ofwat and the Postcomm will both issue consultation papers in determining access disputes, however the Ofcom, will only consult publicly on the outcome of a dispute when the issue is of interest to a large number of stakeholders (otherwise, consultation is limited to the parties involved in the dispute). Ireland places a strong emphasis on consultation and the CER will consult publicly on all its decisions, including access disputes. In New Zealand, the Electricity Commission has discretion in determining the nature and level of consultation in different matters, including dispute settlement. In Sweden, parties in telecommunications disputes have no involvement in the PTS's decision beyond the making of initial submissions.

Broad consultation is evident in some *ex ante* regulatory processes. Furthermore, where consultation occurs it may occur at various stages of the regulatory process. For example, multiple consultation points are common in the UK and Ireland. In undertaking its Market Analysis Decisions, the Dutch NMa consults widely both nationally and internationally, up to the point of the formal hearing, after which participation in the process is limited to those who can establish a relevant 'interest' in proceedings.

Regulators in a number of jurisdictions also consult on policy issues and changes to regulations as well as consulting within formal decision-making processes. Consultation outside specific regulatory processes is discussed in more detail in chapter 6, which deals with the role of interested parties in regulatory matters.

### *Consultation Periods*

Minimum consultation periods vary across the benchmark countries and according to the regulatory process. Where minimum consultation periods are prescribed, such periods can vary according to the regulatory process. In Ireland, 28 days is the minimum period for submissions in any CER consultation process. In the UK, the Ofgem's consultation periods are typically a minimum of six weeks.

More rarely, consultation periods may be reduced. For example, in the US, 'fast-track' procedures can reduce the time in which comments may be submitted in relation to applications or complaints to the FERC and the FCC. In California, the California Public Utilities Commission (CPUC) may also reduce or waive the period for public review and comment on proposed decision in certain circumstances including where all the parties agree.



### *Impact of Consultation*

The impact on regulatory processes of consultation across the benchmark countries is very difficult to assess. In some of the benchmark countries, it is evident that regulators systematically respond to the submissions received in consultation periods as part of the decision making process. In Ireland, for example, the ComReg will publish its own responses to submissions received in a consultation process, and in the UK, the decision documents of the Ofcom and the Ofgem will typically contain its response to issues raised by interested parties during the consultation period.

In most cases, however, the response of regulators to, and impact on regulatory processes of, submissions received or made during consultation processes is not as easy to determine. For example, in France the ARCEP is required to notify the public of any decision which will have a significant impact on the market and publish comments received, but it is unclear how this notification and publication requirement impacts on regulatory outcomes.

The impact of consultation on final decisions may reflect the duties of the regulator. For example, in the UK, the Ofgem has a general duty to take account of social and environmental objectives (in addition to efficiency and competition objectives). Accordingly, it needs to assimilate a broader range of interests in its consultation processes than regulators in other benchmark countries, and weigh up a greater range of potentially competing interests in reaching decisions.

In rare cases, there is evidence of the direct impact of consultation processes on outcomes. For example, again in the UK, consultation for the setting of price controls in airports has recently taken a form closer to negotiation (so-called ‘constructive engagement’), with the parties determining volume and capacity requirements, service quality, capital investment and operating expenditure efficiency (which will form inputs into financial modelling provided to the CAA), subject to the approval of the CAA.

In addition, high levels of consultation in setting access conditions have been linked with reduced incidence of access disputes. For example, in the Netherlands, the NMA reports that its Market Analysis Decisions, created through an open consultation process, have reduced the number of disputes in non-price access matters.

### *Lodgement Hurdles*

In some benchmark countries, there is a higher hurdle that must be met before the regulator will commence its regulatory process that generally involves consultation.

In the UK, the post regulator (the Postcomm) emphasises commercial negotiation between Royal Mail and access seekers. It will only determine a dispute once attempts at commercial negotiation have been exhausted. Similarly, the rail regulator (the ORR) requires Network Rail and TOCs to undertake certain consultations prior to submitting an arrangement to the ORR for determination. For example, the regulated entities in rail are obliged to consult with stakeholders to resolve any concerns about a proposed access agreement raised during consultation. Those consulted have two days to advise whether they are satisfied with the response to their concerns. The ORR will only make a determination once consultation with stakeholders has been exhausted.

In Canada, the federal energy regulator (the NEB) expects toll and tariff applicants to undertake consultation with all relevant stakeholders outside of the formal hearing

process. In the US, the federal rail regulator (the STB) requires all parties to a dispute over rates to participate in mediation.

In France, the rail infrastructure manager, the RFF is obliged to publish annually a network statement governing standard access condition, which is subject to consultation with stakeholders and the ultimate ministerial approval. These requirements on the RFF in relation to the creation of network statements have resulted in little access disputation and therefore effectively reduced the need for strong regulatory presence. As a consequence, certain rail disputes are required to be resolved within two months and there is a minimal involvement by the interested parties in the regulatory consultation process.

#### *Direct Engagement with Individual Parties*

In some benchmark countries, regulators seem to be cautious of engaging in direct discussion with individual parties. For example, in Canada, prospective applicants may request a pre-application meeting with the federal energy regulator (the NEB). The meetings give both the regulator and the prospective applicant an opportunity to establish contacts, discuss filing requirements and identify resources. However, NEB staff members present in the meeting cannot give any substantive advice. In addition, the meeting is documented, and the agreed minutes are made publicly available. Similarly, in the UK, the airport regulator (the CAA) enters into pre-lodgement discussions with relevant parties in order to improve the timeliness of decision making. However, the process appears to focus principally on administrative issues. In Ireland, the rail regulator (An Bord) is required to hold pre-lodgement discussions at which the regulator gives advice on the procedures to be followed and the considerations that may impact its decision.

However, other benchmark countries appear to take a different approach. In Germany, in relation to non-price energy and telecommunications disputes, parties are encouraged to seek a pre-lodgement 'mediation' with the relevant Ruling Chamber. The mediation process is more streamlined than the formal process, with brief submissions (usually around ten pages) and the Ruling Chamber typically reaching a decision within three weeks. In addition, details of the proceedings are not put into the public domain. While the decision is non-binding, it sets out the Ruling Chamber's thinking as to how it would address the matter if a formal application is made. The FNA reports a high willingness among parties to participate in this pre-lodgement process.

#### *Alternative Dispute Resolution (ADR)*

Some benchmark countries formally provide some ADR mechanisms, such as mediation and arbitration, prior to the final regulatory determination in the event of access disputes (although, in some cases, this is only applicable to non-price access disputes).

In Canada, the legislation governing rail disputes provides for a system of final-offer arbitration. Alternatively, parties may elect mediation supported by the rail regulator (CTA). The CTA recently reported that 29 of 31 completed mediations were resolved to the satisfaction of both parties.

In the US, the FERC provides a Dispute Resolution Service (DRS). DRS staff is not subject to rules prohibiting off-the-record communications, but is subject to separation of function rules which prevent DRS staff from communicating substantive matters with non-DRS staff. In the case of the FCC, parties are encouraged to contact

its Markets Dispute Resolution Division (MDRD) staff before filing a formal complaint to describe the issues raised in the dispute and to discuss the appropriateness of pre-complaint mediation. The MDRD's mediation process is a pre-requisite before a complaint can be resolved using the Accelerated Docket procedures. In relation to airports, the Federal Aviation Administration (FAA) requires a complainant, prior to filing a formal complaint, to try to resolve the dispute. Certain officers within the FAA are available upon request to assist the parties with informal resolution. The FMC also has a Dispute Resolution Service.

In France, in relation to energy, a different form of mediation is offered. When an access dispute arises, the president of the Committee for Disputes Settlement and Sanctions (CoRDIS under the ERC) appoints a member (or members) of staff (*le rapporteur*) to conduct a formal, mediated debate. Parties provide a series of responses and counter-responses outlining arguments and proposing adjustments to the demands of each party. This process may continue up until the hearing by the Committee (at which the parties are heard and the *rapporteur* provides a summary of the submissions made up until that date). A similar process is followed by the telecommunications and post regulator, the ARCEP.

In the Netherlands, the telecommunications regulator (the OPTA) generally resolves non-price access disputes using mediation techniques.

#### *Summary on Consultation*

In summary, almost all of the regulatory agencies examined have requirements to consult in regulatory processes. However, the nature of the consultation process, the time period in which consultation is conducted and the level of involvement of different interested parties can vary substantially across different forms of regulatory applications in the benchmark countries. Where consultation occurs, it may occur at various stages of the regulatory process and may occur through formal or informal mechanisms (or a combination). The impact on regulatory processes of consultation across benchmark countries is difficult to assess, however, there is some evidence that higher levels of consultation by the regulator or the regulated businesses in setting access conditions, for example, have been linked with a reduced incidence of access disputes.

It is also observed that regulators in some benchmark countries may opt to the use of higher lodgement hurdles, direct engagement with individual parties or formal ARD or a combination of them to reduce the need for regulatory consultation and subsequent determination.

#### *Timeliness*

The time taken for regulator to make a decision can increase uncertainty for regulated firms and their customers. The timeframe can be influenced by the requirements to consult, as well as the availability of, and timeframes for, appeals against regulatory decisions. Such appeal rights and timeframes vary across the benchmark countries, and these aspects are considered in more detail in chapter 8.

Nevertheless, regulated firms may have incentives to extend timeframes – to delay price reductions or deter competition – by providing incomplete or unnecessary information or delaying submission of requested information. Thus it may be appropriate to place time limits on decision making. However, the desirability of doing so must be carefully balanced with the desirability of the regulator having

sufficient time to consider often large amounts of complex information and issues in consultation with stakeholders.

### *Access Disputes*

Timeframes in access disputes, where specified, are typically between two and four months. For example, decisions on non-price access applications in Germany must be made within two months (energy) or ten weeks (telecommunications). Both the CER in Ireland and the CRE in France have two months to make decisions in access disputes, while in the UK, the Ofcom seeks to resolve disputes within four months.

In those EU member states reviewed, timeframes in telecommunication disputes are influenced by the EU *Framework Directive in Telecommunications* that requires access disputes to be resolved by NRAs ‘in the shortest possible time frame and in any case within four months except in exceptional circumstances’.<sup>33</sup> In the Netherlands, the telecommunications regulator (the OPTA) is required to make decisions, other than Market Analysis Decisions, within four months although this can be extended in certain cases – namely, where the OPTA asks for new information, or the parties consent. Similarly, in Sweden, the telecommunications regulator (the PTA) is required to consider disputes within four months. In France, the telecommunications and post regulator, the ARCEP, has a four-month timeframe, which may be extended to six months in the case of telecommunications.

In benchmark countries where ADR or informal processes are encouraged in the settlement of access disputes, indicative timeframes are harder to specify. For example, in federally regulated energy disputes in the US, the time period in which a complaint is resolved via ADR is largely in the control of the affected parties, as the process is voluntary. If the matter is within federal jurisdiction then the FERC would expect to make a decision any time between 60 and 90 days.

In some jurisdictions, time limits are imposed on ADR processes where these are undertaken as an alternative to formal resolution. For example, in Sweden, if mediation continues without resolution of a telecommunications dispute for a period longer than four months, the PTS will intervene and resolve the dispute through the formal process. In the US, rail proceedings may only be held in abeyance for 180 days while ADR procedures are pursued.

Where timeframes for dispute settlement are mandated by legislation, extensions are possible in some benchmark countries, either with or without qualifying criteria. For example, in Ireland, time extensions (from two months to four months or more in certain cases) are available to the CER if additional information is sought, the complainant consents, or if there is no consent but the issue relates to major new generation assets. In the UK, the Ofcom may exceed timeframes on the basis of unforeseen work or circumstances. The most common criterion for extensions of timeframes is the consent of the parties. In addition, regulators in some benchmark countries appear to ‘stop the clock’ for consultation periods where requests for new information are made.

### *Determinations Relating to Price and Non-price Access Conditions*

Timeframes for the *ex ante* setting of price or non-price access conditions are often not prescribed. For example, there are no prescribed timeframes for Market Analysis Decisions in the Netherlands (which set access prices for a range of regulated

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<sup>33</sup> *Electronic Communications Framework Directive* (2002/21/EC), Article 20 (1).

telecommunication services) or for Standard Term Determinations in New Zealand (which apply to all access users of specific telecommunication services).

Indicative timeframes are, however, available in respect of these types of processes in some benchmark countries. In Germany, for example, the *ex ante* process for setting access prices in energy takes approximately six months. In New Zealand, the NZCC must make reasonable efforts to prepare a Standard Access Determination in 40 to 50 days.

Price approval decisions sometimes have prescribed timeframes. In Canada, the CRTC must make a decision with regard to Tariff Filing Applications within 45 business days (although an extension of time is available).

In some of the benchmark countries, regulators develop ‘benchmark agreements’ as a reference point for negotiations between access providers and seekers. The development of these may have substantial timeframes. For example, the Benchmark Transmission Agreement designed by the New Zealand Electricity Commission has been developed over three years and has involved extensive consultation with industry participants.<sup>34</sup>

An alternative to regulators seeking extensions of formal time periods is the establishment of practices which seek to shift part of the work involved in a regulatory process to the pre-lodgement stage. For reasons of timeliness, pre-lodgement discussions are undertaken by regulators in some benchmark countries, for example in the UK, by the CAA, and in Ireland by An Bord, as a legal requirement.

#### *Complaints and Investigations of Breaches of Regulations*

In the UK, the Ofcom seeks to resolve complaints relating to possible breaches of regulatory agreements within six months and to take an infringement decision with twelve months. In France, the ARCEP has four months to make a decision from receiving a complaint. The actual timeframe in which complaints are responded to may depend on when the timing commences. For example, in New Zealand, decisions on complaints for breach of regulations must be made within 40 days of receiving all relevant submissions. In Canada, the rail regulator, Canadian Transportation Agency (CTA) must make a decision on a complaint within 120 days of receiving the complaint, although this may be extended if the parties undergo mediation or the parties agree.

#### *Other Regulatory Functions Performed by Regulators*

In the UK, the Ofcom may impose access conditions on providers of communications networks if the provider is found to have significant market power in certain markets through a market review carried out under national legislation transposing an EU Directive. This process appears to equate broadly to a decision under the Australian access regimes first to declare a service, and then to determine terms and conditions of access through an arbitration process. The most recent review was completed by the Ofcom in 2005, and was a two-year process.

In Canada, the federal energy regulator primarily responsible for regulating inter-provincial network development, the NEB, takes approximately nine to twelve months to make final decisions.

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<sup>34</sup> The Model GRD-F contract, developed in France, similarly provides a basis from which parties in the energy sector are encouraged to negotiate fair access terms, although there is no information available on the timeframe for its development.

### *Measures to Meet Timeframes*

In order to meet the prescribed or targeted timeframes for performing its regulatory functions, the Ofcom will usually not agree to extend a consultation timeline, and enforces parties' obligations to respond to information requests within a timely manner. In relation to water disputes about terms and conditions of access, the Ofwat sets target timeframes for each stage of the determination process which roughly equate to a four-month process. Where a party does not provide information within its timeframe, the Ofwat may decide to proceed on the basis of available facts. In relation to rail access determinations, the regulator (the ORR) has a target of around four months, although, in 2006-2007, about 30 per cent of cases were delayed due to complexity or the conduct of the parties.

Similarly in Germany, the FNA's preference is to limit the number of interested parties involved in the regulatory process in its determination on access issues in relation to energy and telecommunications due to the tight timeframes set.

### *Consequences of Failure to Meet Timeframes*

There was little evidence in the benchmark countries examined of consequences for regulators who fail to meet timelines. For example, the NZCC in its capacity as telecommunications regulator in the New Zealand is required to make reasonable efforts to make a determination, including a price determination, within ten weeks. However, the two major determinations made to date were processed within six to eight months.

Among the few instances identified, consequences for failure to meet timeframes appear to differ. In France, if the Mission for Control of Rail Activity (MCAF) has not provided an opinion on a reference document within two months of receipt of the document for review, its silence is considered as approval. In contrast, if the US postal regulator, the PRC fails to act in a timely manner in handling a complaint, it shall be treated in the same way as if it had been dismissed by an order issued on the last day allowable (complaints not acted on in a timely manner are treated as failing to identify non-compliance). In the Netherlands, if a decision is not made by the OPTA within prescribed timeframes, a party can seek an order from a court requiring the OPTA to take a decision.

In some of the benchmark countries, there are transparency requirements or practices in relation to the reasons for delays. For example, in New Zealand, the NZCC must give reasons to the parties concerned in a telecommunications dispute in writing if it does not prepare a standard access determination within the requisite timeframe. In the UK, the Ofcom will publish a reason for any delay, and the Ofgem will notify relevant stakeholders of delays.

### *Initiatives to Expedite Regulatory Processes*

In some of the benchmark countries there is evidence of initiatives to expedite regulatory processes. In the US, both the FCC and the FERC provide options for accelerating or 'fast-tracking' the hearing of complaints. In telecommunications matters, the accelerated docket process allows staff to determine the matter. This decision can be subsequently reheard formally, on request within the specified time limits. 'Fast-tracking' is only available where a complainant can present a highly credible claim that standard procedures are not appropriate.

In Germany, the FNA's pre-lodgement mediation processes can result in a decision being taken typically within three weeks (compared with ten weeks under the formal process), and is reported to be frequently used for resolving disputes. In Canada, Final Offer Arbitration exists as an alternative to resolution of a dispute by the CTA in rate and service disputes between carriers and shippers in rail. The Arbitration must be completed within 60 days (or 30 days for disputes below a particular value) compared with 120 days for the formal process. The process is confidential, the parties may choose their arbitrator, and there is procedural flexibility.

Decisions made under fast-track procedures may, however, be non-binding – like decisions under Germany's pre-lodgement mediation process – or may be given lower weight than decisions made under standard processes. For example, in California, where an Expedited Complaint Procedure is available, decisions made under the procedure (where the claim is below a specific value) are not considered as precedent or binding on the CPUC or courts.

#### *Summary on Timeliness*

In summary, timeframes for the conduct of regulatory processes appear to vary according to the regulatory application under consideration, the industry or sector and the jurisdiction. Formal decisions on access dispute issues can, for example, take any time between two and four months. The timeframes for informal processes (such as ADRs) can vary significantly and are largely in the control of the affected parties. Timeframes for the setting of price and non-price access condition are often not prescribed. However, indicative timeframes are available in respect of these types of processes in some of the benchmark countries and suggest that these issues can take between 40 days and six months depending on the matter.

There was little evidence across the benchmark countries of consequences for regulators who fail to meet timelines, although in some of the benchmark countries regulators are required to state reasons for delays. There is also evidence in some benchmark countries of initiatives being introduced to expedite regulatory processes, including: 'fast-tracking' the hearing of complaints or the use of pre-lodgement mediation processes.

#### *Decision-making Process*

The decision-making processes employed by regulatory agencies appear to be a function of the more general institutional design and regulatory framework within which regulatory agencies operate. The determinative body of many regulators are Commissions or Boards, however, the number of commissioners or members comprising these determinative bodies can vary from as few as two (the CER in Ireland) to as many as thirteen (the CRTC in Canada). Unanimity is required for decisions by a number of regulators – the NMa in the Netherlands and the UK's Postcomm. Other regulators have provisions governing majority votes, casting votes and quorums for decision making.

#### *Delegation of Decision-making Powers*

The decision-making functions of determinative bodies are delegated in very few of the benchmark countries. For example, in the US, the FERC delegates some of its responsibilities to The Office of Administrative Law Judges who can resolve contested cases, and conduct investigations and ADR procedures as directed by the FERC. In the Netherlands, the NMa makes decisions in relation to significant matters. However, the directors of the OER and the Office of Transport Regulation

(OTR) have some authority to take lower-profile decisions. Those directors are civil servants.

In Germany, there are a number of determinative bodies within the regulator rather than a single determinative body. These bodies, known as Ruling Chambers, are organised along industry lines (electricity, gas, telecommunications, postal) and also according to specific activities within the industries (system charges, general regulation and access issues, wholesale charges, unconditioned local loop charges, etc.). This structure enables the decision makers within each Chamber to develop specialisation in the area they are regulating.

#### *Use of Sub-groups or Committees*

In some benchmark countries substantial work in relation to a matter is undertaken at lower than Board/Commission level, or through sub-groups or committees, prior to a formal determination. For example, in the Netherlands, the Commission of the OPTA typically receives decisions at draft stage, and is not involved in specific investigation or development of a matter prior to that point.

#### *Independence and Requirements to State Reasons for Decisions*

In most infrastructure areas, in the majority of the benchmark countries surveyed, regulators make decisions independent of government. The exceptions to this are: in Japan, where ministerial control remains common other than in respect of telecommunications disputes; in telecommunications in France, where some of the ARCEP's functions require ministerial approval; and in the postal industry in Ireland where ministerial consent is necessary for the ComReg to set uniform tariffs.

Regulators in most benchmark countries make their decisions and reasons for decision publicly available. There is some variation in decision length which may reflect the detail of reasoning (for example, a decision report on energy matters can be from a standard fifteen pages in the CRE determination in France to hundreds of pages in the NEB determinations in Canada). It is common practice for some regulators to issue draft decisions (or proposed decisions or preliminary views), with reasons, and invite submissions prior to making a final determination (the CER in Ireland, the Ofcom and the Ofgem in the UK).

#### *Summary on Decision-making Process*

In summary, the decision-making processes of regulatory agencies appear to be related to the general institutional design of those agencies. The ultimate determinative body in many cases is the governing commission or board, and in most of the benchmark countries, regulators make decisions independent of government. In only a few of the benchmark countries are the decision-making functions of these determinative bodies delegated to other bodies. However, in some cases, there can be a number of determinative bodies within the regulator. Alternatively, sub-groups or committees can be formed to consider a decision prior to a formal determination being made. The majority of regulators make their decisions publicly available with reasons, although there is some observed variation in decision length which may reflect differences in the detail of reasoning. In addition, it is now common practice for some regulators to issue draft decisions and invite submissions prior to making a final determination.



## *Overview of the Consultation, Timeliness and Decision-making Process in Australia*

The procedures followed by the ACCC and the AER vary depending on the legislative requirements for the particular function or power being performed. Informal consultation is restricted by administrative law requirements to provide procedural fairness, which generally requires the ACCC to give all affected parties an opportunity to respond to material and to avoid the appearance of bias.

The stages of regulatory decision making in access arrangements for gas pipelines, setting the revenue and/or price paths for electricity networks, assessing undertakings and making arbitration determinations under the economy-wide and telecommunications-specific access regimes and forming a view on price notifications by Australia Post and Sydney Airport are usually as follows.

- The regulated entity submits (either voluntarily or because it is legally required to do so) its proposed terms and conditions of access. This proposal is usually accompanied by a detailed submission in support of the proposal.
- The ACCC and the AER will commonly publish an issues paper or a discussion paper inviting written submissions within a specified time.
- After considering the submissions, the ACCC and the AER will typically publish a draft decision (including reasons for the draft decision) and invite written submissions on the draft decision within a specified time. For example, there are nine weeks to make submissions to the AER on a draft decision in relation to an access provider's proposal in electricity.
- After considering the submissions, the ACCC/AER publishes a final decision (including reasons for the decision).

In general, the process is conducted publicly, in that submissions and the decision are placed on the ACCC/AER's websites (subject to any confidentiality requirements).

The ACCC/AER tends to place greater reliance on documentary material than on oral submissions, public forums or bilateral discussions with particular parties.

The volume of material considered in, and supporting, a regulatory decision is dependent upon the particular decision that is being made. However, in matters that have been reviewed by the ACT, it is common for the ACCC/AER to produce around 30 lever arch files containing the documents that were before the ACCC/AER.

Particularly where the industry or sector has been liberalised, the process tends to be relatively adversarial in that the regulated entity (along with other interested parties that have a significant financial stake in the decision) is represented by lawyers; obtains expert reports; and is active in providing material to support its position. However, the process is also inquisitorial in that the ACCC/AER is active in setting the process that is followed and seeking information (the ACCC/AER commonly obtains its own expert reports).

Decisions are made by the Commission or the Board, rather than an individual. As at May 2009, the ACCC consisted of seven members, and three associate members. In general, in order for a decision to be made, there must be a quorum of at least three members. Questions are decided by a majority of votes, although, in practice, matters rarely proceed to a formal vote. Before a draft decision or final decision is made, the proposed decision is usually considered by a committee consisting of a sub-group of

commissioners (although such a committee is not a decision-making body). The AER consists of three members. In general, in order for a decision to be made, there must be a quorum of at least two members, and matters must be determined by a unanimous vote.

The ACCC and AER are supported by staff and consultants. The Regulatory Affairs Division is divided into five main groups or branches: Australian Energy Regulator; Communications; Water; Fuel; and Transport and General Prices Oversight. Each paper (e.g. issues paper, draft decision and final decision) is drafted by staff in the relevant branch and, if necessary, in consultation with staff in the specialist economics and legal branches. Staff members prepare a covering minute recommending the decision to be made by the ACCC or the AER. The organisation is also supported by separate branches of in-house lawyers and economists.

In response to concerns about increased uncertainty arising from the length of regulatory decision making, in 2006, Australian governments agreed to introduce requirements that regulators will be bound to make decisions within six months (subject to the regulator being given sufficient information, and consultation periods).<sup>35</sup> There is no binding timeframe for arbitration decisions in telecommunication disputes, although the ACCC endeavours to make a decision within six months of notification, excluding the time taken to acquire information and for consultation. In rail, the ACCC is subject to a best-efforts requirement to decide whether to approve an undertaking submitted by proposed providers of rail services within six months. The ACCC is required to make decisions on postal pricing notifications within 21 days. However, to ensure that it has sufficient time to consider the issues, the ACCC arranges for the regulated entity to provide a draft notification, upon which consultation will be held and a preliminary view given in accordance with an agreed timeframe, prior to formal notification and the commencement of time-keeping.

In general, each party bears its own costs of participating in a regulatory process, and does not pay the costs incurred by the ACCC/AER in conducting that process.

Notable exceptions to the procedures discussed above are:

- Arbitration determinations: The arbitration process leading to determination is required by the legislation to be conducted privately (although the final determination may be published); the decision is made by a sub-group of Commissioners who are constituted to conduct the arbitration; and the parties contribute to the ACCC's costs of conducting the arbitration. In the case of telecommunications arbitrations, the ACCC is also able to facilitate ADR processes.
- Energy regimes: In contrast to the usual timeframe of six months, the legislation requires an electricity network to submit a proposal thirteen months prior to the start of the relevant regulatory period. The AER's decision must be made at least two months before the start of that period (a timeframe of eleven months). A final decision on a gas access arrangement must be made within thirteen months of receiving the proposal.

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<sup>35</sup> Council of Australian Governments, *Competition and Infrastructure Reform Agreement*, 10 February 2006, Clause 2.6.

### *International Practice and Procedure – Key Insights*

As noted, regulatory practice is influenced by a range of factors, some of which may be specific to a country. For example, reflecting its history, Australia has adopted the common law of the UK which enabled the legality of an administrative decision to be challenged on the ground that there was a breach of the rules of natural justice. In essence, this requires the regulator to give affected parties a fair opportunity to put their case. This creates an impetus towards a more formal process, particularly where an industry or sector has been liberalised. In addition, regulators must operate within their respective legislative frameworks. This may constrain the regulator's discretion to adapt its regulatory practices.

Nevertheless, within these constraints, there are four areas of international practice that are of particular relevance to Australia: firstly, expedition of regulatory processes; secondly, facilitation of commercial negotiation; thirdly, direct engagement by the regulator and fourthly, provision by the regulator of formal ADR.

#### *Expedition of Regulatory Processes*

The length of time necessary to conduct regulatory processes has been a perennial issue in Australia. For example, in 2005, the Exports and Infrastructure Taskforce concluded:<sup>36</sup>

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.

One of the most significant administrative changes to Australian economic regulatory processes has been to reduce the time commonly taken to conduct regulatory processes from around twelve months to six months. This has been achieved by legislative amendments to reduce the incentive for a party to delay the process (for example allowing the ACCC to make interim arbitration determinations and to back-date final arbitration determinations; allowing the AER to disregard late submissions; and precluding parties from participating in an appeal unless they provided a submission on time to the AER). Legislative amendments have also reduced the scope of regulatory discretion. For example, the *National Electricity Rules* requires the AER to set certain WACC parameters on a five-yearly basis, which are then applied to all electricity network determinations made within that period. In contrast, under the former *National Electricity Code*, these parameters were strongly contested each time the ACCC was required to set a network's revenue cap.

Regulators have also improved timeliness by changing their own internal processes in a number of ways including:

- greater preparation by staff for matters that are expected to be lodged; and
- improving the efficiency of ACCC/AER processes (for example, issuing guidelines on the information that the ACCC/AER expects a regulated entity to submit with its proposal).

Despite these changes, the issue of how to balance timeliness with the other objectives of effectiveness, transparency and consultation remains an on-going concern.

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<sup>36</sup> Exports and Infrastructure Taskforce, *Australia's Export Infrastructure*, Report to the Prime Minister, Canberra, May 2005, p. 2.

In this context, it is interesting to compare other countries' regulatory processes where formal timeframes in most cases seem to range from between four to twelve months.<sup>37</sup> However, there are a number of exceptions as considered earlier in this chapter. In particular, shorter timeframes than four months have been set for many regulatory determinations, covering energy and rail access disputes in France, energy and telecommunications non-price access in Germany, energy access disputes in Ireland, and telecommunications access in New Zealand.

The review of international experience suggests that the time taken to conduct a regulatory process is related to a number of factors. These include the type of matter (pricing, investigating breaches of conditions, non-price terms, etc.) under consideration; the extent of requirements to consult; the extent of the involvement of different parties in the process; and, the industry or sector being regulated.

As a general observation, it appears from the review that formal requirements that a more sophisticated regulatory process be shorter than four months can only be achieved by the curtailing of consultation and transparency. Where shorter periods are adopted they appear to be in areas where an effective pre-lodgement process exists (such as Germany), where the matter is relatively simple (e.g., non-price access terms) or where the State retains ownership and control of the regulated entity (e.g. France).

#### *Facilitating Commercial Negotiation*

In 2006, Australian governments affirmed that, in the first instance, terms and conditions for access to infrastructure services should be commercially agreed between the access seeker and infrastructure provider.<sup>38</sup> In this respect, there are a number of international practices, considered earlier under the subsection 'lodgement hurdles' that are of particular interest. These include initiatives introduced by the Postcomm and the ORR in the UK, the NEB in Canada and the STB in the US, which set a higher hurdle, such as the requirement of a party to consult the industry or the exhaustion of alternative dispute resolution avenues, to meet before the regulator will commence its process.

In contrast, there are no such hurdle requirements in Australia. Under the Australian general and telecommunications-specific access regimes, if an access seeker and access provider are unable to agree upon the terms and conditions of access, either party may notify a dispute. The ACCC may terminate arbitration if it thinks that the notifier has not engaged in negotiations in good faith. In cases where the regulated entity unilaterally submits a proposal such as an undertaking or gas access arrangement, some entities (such as the ARTC) have, of their own volition, undertaken extensive consultation with industry prior to lodgement. However, in no cases there is a formal requirement for the parties to consult or first exhaust other avenues for resolving the dispute.

In comparing timeliness with and without pre-lodgement negotiations and mediations, the duration of pre-lodgement processes needs to be included in overall timeframes for dispute settlement. Accordingly, improvements in timeliness only flow from such pre-lodgement hurdles where these processes are more streamlined than formal processes, and where disputes either do not proceed from such processes to formal

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<sup>37</sup> Of course, there may be a difference between statutory timeframes and actual time taken. It is exceedingly difficult to get information on the latter. The collection of such information, even if on a more limited scale in terms of industries and/or countries, is a priority for future research.

<sup>38</sup> *Competition and Infrastructure Reform Agreement*, 10 February 2006, Clause 2.2.

settlement or, where the dispute does proceed, the formal process that follows is expedited sufficiently to outweigh the duration of the preliminary process. Expedition would occur particularly from the issues for resolution having been more precisely delineated by pre-lodgement mediation and negotiation.

#### *Direct Engagement by the Regulator*

In Australia, formal oral hearings are generally regarded as being of less value than written submissions, particularly where the regulator passively listens to parties repeat what has already been said in the submissions. Regulators have also been cautious of engaging in face-to-face discussions on substantive issues with individual parties (either prior to or following lodgement) due to the risk that this could create perceptions of bias or a failure to give other parties a fair opportunity to respond to adverse material.

In some countries, regulators seem to take a similar approach as in Australia. As considered earlier, the NEB in Canada, the CAA in the UK and An Bord in Ireland may engage in pre-lodgement discussions with individual parties, for reasons other than effective communications. In contrast, other countries appear to take a different approach from that of Australia. In particular, the FNA in Germany shows a positive attitude towards direct engagement with individual parties.

However, research suggests that if people feel that they have been treated fairly and with respect, they are more likely to engage constructively in the regulatory process and accept the outcome.<sup>39</sup> One particularly effective means of achieving this is by the regulator engaging in face-to-face meetings with parties, and being actively involved in the discussion – for example, responding to questions, raising issues and explaining the regulator’s position.

#### *Regulator-provided ADR*

In some countries, ADR appears to be a formal part of the regulatory processes. The range of ADR procedures includes: dispute resolution services provided by the US regulators in energy, telecommunications, airports and ports; mediations offered for energy, telecommunications and post disputes in France; final-offer arbitration and mediation provided by the CTA in Canada. In the case for the Netherlands, the OPTA offers mediation to non-price disputes only.

The Australian telecommunications-specific access regime allows the ACCC to give directions in relation to negotiations and, if requested by both parties, attend or mediate a negotiation. However, there is no ‘ADR branch’ within the ACCC and the AER, and, more generally, regulators are cautious of being involved in such processes due to the legal risks this creates in the event that there is no negotiated outcome and the regulator is required to make a decision.<sup>40</sup>

The international experience from the benchmark countries suggests that there may be additional avenues by which Australian regulators can facilitate the commercial resolution of access issues. However, facilitation of greater commercial resolution

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<sup>39</sup> See, for example, Valerie Braithwaite, ‘Ten Things You Need to Know About Regulation and Never Wanted to Ask’, *Australian Law Librarian*, 14, 3, Spring 2006, pp. 19–28; p. 19.

<sup>40</sup> An arbitration is a quasi-judicial process. If an arbitrator is involved in a mediation or facilitated negotiation, then there is a risk that they would be precluded from arbitrating the dispute to avoid a denial of procedural fairness (appearance of bias or prejudice).

needs to be weighed against the delay to the formal regulatory process, and the legal risks it creates to any subsequent regulatory decision.

## 6. Involvement of Interested Parties in the Regulatory Process

This chapter examines the role of interested parties in regulatory practices and processes across the benchmark countries. While there are various parties that can be affected by regulatory outcomes, the key stakeholders in the infrastructure industries are typically infrastructure providers, access seekers and end users (both businesses and consumers). The relative importance and influence of each party may differ across industries/sectors and by country. For example, an industry-specific access regime is often considered to be an essential competitive safeguard in telecommunications and, therefore, access seekers generally play an important and active role in the telecommunications regulatory process.

Interested parties are often organised into groups representing them and their interests in the regulatory process. Some groups may have limited memberships, representing only one type of stakeholder (such as large end users or infrastructure providers). Other groups may have a mix of interested parties, comprising two or more of the types of stakeholders. A list of the main bodies involved in the Australian regulatory process is included later in this chapter.

This chapter considers particularly three types of representative bodies participating in the regulatory process – consumer groups representing individual and household users; industry bodies representing infrastructure providers; and industry councils representing users, providers and the regulator. With respect to consumer groups, their status, their composition, the manner and frequency of their interaction with regulators (including their standing in regulatory processes), the funding arrangements and the extent to which they influence regulatory policy, are considered. Infrastructure industry bodies are generally active in the regulatory process as they often make submissions on behalf of their members in response to regulatory matters that directly affect infrastructure businesses. The chapter will instead, focus on some special roles taken by the infrastructure industry bodies, within and outside formal regulatory processes. In addition, the chapter considers the extent to which industry councils or forums involving the regulator together with infrastructure providers and users have a role in the settlement of access disputes outside formal regulatory processes. On the basis of this review, some particular ideas are drawn out that may have relevance to the Australian context.

### *Consumer Groups*

The protection of consumer interests is one of the core functions of most regulators in benchmark countries. For example, the Irish CER's mission is to act in the interests of consumers to ensure that

the lights stay on, the gas continues to flow, the prices charged are fair and reasonable, and the environment is protected and electricity and gas are supplied safely.<sup>41</sup>

Similarly, in Sweden, the PTS is required to act in the best interests of consumers while in the UK all of the economic regulators have a statutory duty to promote or further consumer interests. For example, the Ofgem's principal objective is to protect the interests of gas and electricity consumers, where possible through the promotion

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<sup>41</sup> CER, *About Us – Overview*, n.d., Available at: <http://www.cer.ie/en/about-us-overview.aspx> [accessed on 12 August 2008].

of effective competition and the regulation of monopoly companies that operate the gas and electricity networks.

Ensuring an adequate voice for consumers is a challenging task as they are typically not individually well-placed to participate in regulatory processes because of cost and time constraints. Nor are disparate consumers able readily to organise themselves into ‘lobby’ groups to represent their collective interests. This could mean that the interests of consumers may be subsumed by the interests of larger industrial and business users who are generally better able to participate in regulatory processes. Sometimes, the regulator itself is the main representative of the consumer interest (reflecting its over-arching legislative mandate). However, in other instances regulatory regimes make specific provision for consumer bodies to represent the interests of consumers in regulatory processes. The following sub-sections review the bodies representing the interests of end users in the benchmark countries: firstly, the status of consumer groups, discussed broadly in terms of three modes of representation – statutory consumer bodies, consumer advocates, and non-statutory representations; secondly, the nature of involvement of consumer groups in the regulatory process, and lastly, the funding arrangements for consumer groups.

### *Statutory Consumer Bodies*

Reflecting the pre-eminence of consumer interests, consumer bodies are established or recognised by legislation in a number of the benchmark countries. These bodies may operate independently of, or at arm’s length within, the regulator.

In the UK, for example, the new National Consumer Council – known as Consumer Focus – is an example of a statutory consumer body that operates independently of the regulator. It was established on 1 October 2008 with an economy-wide remit, rather than industry-specific one, under the *Consumers, Estate Agents and Redress Act 2007*. The Council has broad legislative powers to investigate, research, provide information and make official ‘super-complaints’ to the OFT, the Ofgem and the Postcomm.<sup>42</sup>

There are also industry- or sector-specific consumer bodies established under various pieces of legislation in the UK. For example, the Consumer Council for Water (CCWater) is an independent public body established on 1 October 2005 under the *Water Act 2003*. Its role is to represent consumers of water and sewerage services in England and Wales. It replaced the WaterVoice committees, which were part of the Ofwat. CCWater undertakes research, investigates consumers’ complaints and participates in the Ofwat’s regulatory processes on behalf of consumers.<sup>43</sup>

A Communications Consumer Panel has been established since 2004 under the *Communications Act 2003* to further the interests of citizens and consumers in relation to communications matters. The Panel is integrated into the regulator but operates at arm’s length and with its own budget. Its function is to advise the Ofcom on the consumer interest in the markets that the Ofcom regulates, with particular attention paid to vulnerable consumers (for example, rural consumers, older people, people with disabilities and those who are on low incomes or otherwise disadvantaged). The Ofcom has entered into a Memorandum of Understanding with the Consumer Panel.

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<sup>42</sup> Consumer Focus was created through the merger of three consumer organisations, EnergyWatch, Postwatch and the National Consumer Council (including the Welsh and Scottish Consumer Councils).

<sup>43</sup> The *Consumers, Estate Agents and Redress Act* provides for the designation of the CCWater for abolition with its roles and functions transferred to the new National Consumer Council.



In some instances, the working relationship between regulators and statutory consumer bodies is required to be the subject of formalised agreement. For example, the new National Consumer Council in the UK is required by legislation to enter into cooperative arrangements with the OFT, the Communications Consumer Panel and any other designated body.

### *Consumer Advocates*

In some infrastructure areas in some benchmark countries, particularly, the US, the establishment of a legislated consumer advocate provides an alternative model for consumer representation in the regulatory process. In some instances, the consumer advocate operates within the regulator. Alternatively, the consumer advocate may be a separate body.

In the US postal industry, for example, the *Postal Accountability and Enforcement Act* (s. 505) requires the PRC in all public proceedings (such as developing rules, regulations and procedures) to designate an officer of the PRC to represent the interests of the general public.

At the state level, ‘ratepayer advocates’ are commonly provided in the infrastructure industries. For example, in California, the independent Division of Ratepayer Advocates’ (DRA) statutory role is to advocate on behalf of the customers of regulated public utilities.<sup>44</sup> The DRA participates as a party representing consumers in CPUC proceedings, including rate settings, investigations, and rulemakings. The DRA also participates in CPUC-sponsored working groups, advisory boards, workshops, and other forums. Finally, the DRA evaluates utility proposals, investigates issues, presents findings and formal testimony, litigates complaints, and makes recommendations to CPUC and to other forums.<sup>45</sup> The DRA operates with an independent budget.<sup>46</sup>

### *Non-statutory Representation and other Models of Consumer Representation*

Conversely, in some of the regulated areas examined, no specific role is assigned to consumers and their representatives in relevant legislation. This appears to be the case in the Netherlands, in the energy sector in Germany, and in Ireland.

In the Netherlands, although no user groups or industry bodies are specifically recognised in relevant legislation, the observed regulatory practice shows that these parties can be consulted depending on the matters considered. For example, in undertaking its market monitoring role, the Office of Energy Regulation (OER) consults with user groups and consumer associations in order to identify any perceived areas of concern. The parties are also involved in the matters in relation to the development of codes in energy networks and the development of the network statement in railways.

The energy regulator in Germany has high-level statutory duties in relation to its regulatory decisions to take account of the views of, and impacts on, consumers,

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<sup>44</sup> California Public Utilities Commission (CPUC), *Division of Ratepayer Advocates*, 2008, Available at: <http://www.dra.ca.gov/dra/> [accessed on 6 October 2008].

<sup>45</sup> CPUC, *Annual Budget and Staffing Report of the Division of Ratepayer Advocates*, 2007, Available at: <ftp://ftp.cpuc.ca.gov/resources/about/dra-report-to-the-legislature+2007.doc> [accessed on 29 August 2008].

<sup>46</sup> CPUC, *Consumer Protection and Safety Division*, 2008, Available at: [www.cpuc.ca.gov/PUC/aboutus/Divisions/Consumer+Protection/index.htm](http://www.cpuc.ca.gov/PUC/aboutus/Divisions/Consumer+Protection/index.htm) [accessed on 29 August 2008].

while in Ireland, consumer views may be taken into account via statutory requirements for public consultation.

The remit of consumer bodies that are formed independently of a regulatory regime will depend on the aims of the organisation and its membership. In the case of the Netherlands, two major consumer groups provide consumer advocacy on energy and water matters: the Association for Energy, Environment and Water (VEMW) represents the industrial users of electricity, gas and water in the Netherlands and is part of the so-called 'user platform' being consulted by the energy industry and the regulator on defining tariff and non-tariff supply conditions;<sup>47</sup> and the Consumer Council (*Consumentenbond*) that aims to protect consumer interests in a wide range of sectors in the economy.

#### *Nature of Involvement*

Across the benchmark countries, consumer group involvement, where it arises, is typically consultative. Such involvement may be statutorily required. For example, in US postal regulation, the PRC may not issue any order unless the USPS, mail users, other affected parties and an officer of the Commission representing the general public have been given an opportunity for a hearing. In Canada, agencies considering a change in pricing for a public port are required by statute to give all service users a reasonable opportunity to provide ideas or proposals for ways to improve the services to which the fees relate.

In an alternative model, the French legislation requires the rail infrastructure owner, réseau ferré de France (RFF) to consult annually with the minister, the MCAF, users and any national rail consumer organisations when drawing up a reference document. There do not appear to be any funding arrangements in place for user groups, with the major user group being self-funded through membership fees.

The role of consumers is implicitly recognised in the Irish legislation via consultation requirements. However, no user groups are specifically recognised or established.

In other instances, it is not a statutory requirement for consumer representatives to be consulted during regulatory decision making. However, there are several other avenues for consumer interests to be represented in such activities. For instance, in France, consumer groups such as the Federal Union of Consumers (UFC) may present written submissions to the rapporteur in relation to disputes in energy and in telecommunications. In addition, the French energy regulator, the CRE, has previously instigated the formation of a consumers' work group tasked with consulting on the functioning of small gas and electricity markets. Such work groups provide a forum for informal interaction between industry participants and the regulator. In the Netherlands, the development of the network statement in rail involves the access providers and user groups. Such groups also play an important role in the annual market monitoring exercises that are undertaken in each of the regulated infrastructure areas.

In some cases, consumer groups may have 'standing' to participate in regulatory proceedings. Examples from the US, as discussed above, include the participation of the DRA representing consumers in the CPUC's regulatory processes and the designation of an officer of the PRC to represent the interest of the general public in

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<sup>47</sup> VEMW, *About VEMW*, Available at: [www.vemw.nl/cms/showpage.aspx?id=24](http://www.vemw.nl/cms/showpage.aspx?id=24) [accessed on 18 May 2009].

all the PRC public proceedings. In Canada, the Telecommunications Rules of Procedure stipulate that, in applications for general rate increases, any interested person or association may intervene.

### *Funding*

Common methods of funding of independent consumer groups are membership subscription or government grants for particular initiatives. Few benchmark countries appear to have provisions for ongoing public funding of external groups representing consumers. In New Zealand, the Electricity Commission is required to consider providing limited funding assistance for consumer representatives where it considers that this may improve the quality of decision making. However, there is no evidence of this funding option being used by the Electricity Commission to date. In Canada, the Office for Consumer Affairs can allocate funding (up to CA\$500 000 a year) for research projects to non-profit consumer groups. In addition, federal and provincial energy regulators in Canada may reimburse reasonable 'costs' for those people, with standing, who make a submission as part of a hearing. For example, any landowner who makes a submission as a part of a hearing related to the creation or routing of a pipeline may be reimbursed for reasonable actual costs incurred, payable by the pipeline company or as the Energy Resources Conservation Board (ERCB) otherwise fixes. People who will be affected by a determination of the ERCB (who have the right to 'intervene' and provide evidence in the hearing process) may also claim 'costs'.

Consumer advocate groups that are integrated within regulatory agencies are typically funded by their own independent budgets. For example, in the UK, the Communications Consumer Panel is integrated into the Ofcom, but operates at arms-length and has its own budget. Similarly, in California, the DRA has its own codified function and independent budget.

In summary, the involvement of end users in some benchmark countries is established or recognised by industry-specific or sector-specific legislation, while in other benchmark countries, no specific role is assigned to consumers and their representatives. Where consumer bodies are established by industry-specific or sector-specific legislation, their remit may be prescribed, or may be the subject of formal agreement between the regulator and the consumer body, and those that are integrated within a regulator will typically have an independent budget. Across benchmark countries, consumer group involvement is typically consultative, although in some cases, consumer groups may have 'standing' to participate in regulatory proceedings. Finally, as regards funding, few benchmark countries examined have provisions for funding of independent groups representing consumers.

### ***Infrastructure Industry Bodies***

As well as involvement of consumer representatives in formal regulatory processes, many of the regulators examined have procedures in place to interact with stakeholders outside formal regulatory processes. One of the exceptions is the German FNA that reported that it does not interact through any organised forums with any energy industry members (or, for that matter, with user groups) outside the scope of individual decisions. Interaction tends to occur only in relation to specific matters as and when they arise. The FNA does not, however, regulate final prices in energy.

In other benchmark countries, infrastructure industry bodies are established or recognised by legislation and may have a legislative remit. Industry bodies may also

be recognised or consulted in other ways outside of regulatory processes. However, a direct role for industry bodies *per se* in the regulatory process (i.e. acting on its own initiatives, not as part of a broader group or as part of a regulatory process) is rare.

Clear specific examples of a direct role for infrastructure industry bodies only come from New Zealand. In New Zealand, under the *Telecommunications Act 2001*, the Telecommunications Carriers' Forum (TCF) is able to prepare, vote on and propose to the NZCC, draft access codes for designated or specified services or for services supplied under a registered undertaking.<sup>48</sup> The TCF is a registered incorporated society whose members are New Zealand telecommunications carriers and service providers.<sup>49</sup>

### ***Industry Councils and Forums***

Experience in a number of the benchmark countries indicates that regulators may interact with user groups, access seekers, infrastructure industry bodies and other interests through representative councils (sometimes called a 'forum', 'committee' or 'advisory panel'). These are most common in energy and telecommunications, but also occur in other infrastructure areas. The roles and functions of the groups vary. In some instances, regulators are required to consult with such bodies as part of the regulatory process; while in others, relations with those bodies are informal and operate outside of specific regulatory processes and matters. The purpose is primarily to facilitate communication between regulators and key stakeholders.

In energy, the industry councils and forums are common in the benchmark countries. In Japan, the Ministerial energy regulator has been supplemented by the Electricity Utility Industry Council, composed of academics, utilities, new entrants, end users and social groups. In New Zealand, the Government Policy Statement on electricity governance states that the Electricity Commission should make extensive use of advisory groups wherever possible, to develop industry arrangements and make recommendations concerning regulations and rules. These advisory groups should have the necessary expertise and be appropriately representative of affected parties, including consumers. Each group has a particular focus – for example, transmission, wholesale markets, or quality. These arrangements allow for interaction and consultation between the regulator and industry outside of any formal processes.<sup>50</sup>

The French CRE instigates, coordinates and facilitates the meetings of various 'work groups' headed by the transmission system operators (TSOs) to maintain dialogue between network operators, producers, distributors, suppliers, consumers and the regulator (itself). It does not appear that there is any government or regulator-arranged funding of the operation of these working groups as the group members employ the necessary resources to undertake their work.<sup>51</sup> These work groups may be created for a specific consultation or for ongoing forums. For example, the 'consumers', 'gas' and 'electricity' work groups were created in 2005 and given the

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<sup>48</sup> In Australia until 2002, the Telecommunication Access Forum was also tasked with producing telecommunications access codes and making recommendations in relation to declared services. The Forum, however, had difficulty reaching consensus and the relevant legislation was repealed.

<sup>49</sup> Telecommunications Carriers' Forum, *About TCF*, Available at: [www.tcf.org.nz](http://www.tcf.org.nz) [accessed on 12 January 2009].

<sup>50</sup> New Zealand Commerce Commission, *Airports*, 2008, Available at: <http://www.comcom.govt.nz/RegulatoryControl/Airports/Overview.aspx> [accessed on 24 July 2008].

<sup>51</sup> *Concertation Gaz*, Transmission System Operators – Working Together with the Market, *Working Group*, Available at: [www.concertationgaz.com](http://www.concertationgaz.com) [accessed on 22 May 2009].

task of providing consultation on the functioning of the small-scale electricity and gas markets. The CRE assigns specific issues for work groups to consider, and those groups provide advice and recommendations to the CRE. This provides an ongoing forum for informal interactions between industry participants and the regulator. In addition, the Superior Council for Energy (which replaced the Superior Council for Gas and Electricity in 2006) is an advisory body to the Minister, established by legislation, and composed of representatives from government, industry, workers' unions, consumer groups, regulators and members of parliament. It was set up specifically to provide an ongoing avenue for communication between the various participants in the industry.<sup>52</sup>

The Irish CER organises a number of industry working groups to work on different aspects of the electricity retail market design and policy.<sup>53</sup> The Retail Electricity Market Industry Governance Group (IGG), for example, was created by the CER to facilitate input from retail participants in retail market governance. It acts as an advisory and discussion panel, but is not a decision-making body.<sup>54</sup> The IGG is chaired by the CER, while the ESB Retail Market Design Service holds position of secretariat. All retail market stakeholders such as suppliers, Eirgrid (the transmission system operator) and the assurance body are members. The IGG meets every six weeks. The CER also organises the Technical Advisory Group, which is comprised of technical and IT representatives from each IGG participant. The Electricity Suppliers Forum was formed by the CER to assist in its retail market policy making responsibilities. Other working groups include the Assurance Advisory Group and the Trading and Settlement Code Modification Panel.

In Sweden, a Market Surveillance Committee is responsible for supervising consumers' rights regarding access to the energy networks and network tariffs. The members of the Committee are appointed by the government and include representatives from parliament, consumer groups and energy companies. This body has no decision-making powers but, instead, is invited to give its opinion on matters relating to policy, regulation and issues of greater importance.

Similarly, industry councils and forums are also commonly in operation in the telecommunication industry. The MIC in Japan is required to consult with the Telecommunications Council in relation to important matters, including establishing standard charges and authorisation of charges, applicable law and policy formation. The Council is composed of representatives from different interest groups.

The French regulator, the ARCEP, participates in meetings of the telecommunications consultative committee which hears reports from end users, producers, government and all other industry participants.<sup>55</sup> The Interconnection and Access Committee is made up of representatives of network operators active in the interconnection market, telecommunications service providers and consumer associations, appointed by the

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<sup>52</sup> CRE, *Ouverture des marchés de l'électricité et du gaz; Généralités sur l'ouverture des marchés*, (in French), 2008, Available at: <http://www.energie-info.fr/questions-reponses/generalites> [accessed on 13 August 2008].

<sup>53</sup> CER, *Industry Working Groups*, n.d., Available at: [http://www.cer.ie/en/electricity-retail-market-governance\\_.aspx?article=3f3ff60d-4f4a-43c3-9154-541b9e4e4182](http://www.cer.ie/en/electricity-retail-market-governance_.aspx?article=3f3ff60d-4f4a-43c3-9154-541b9e4e4182) [accessed on 1 May 2008].

<sup>54</sup> CER, *Governance Procedures for the Liberalised Retail Electricity Market – A Response and Decision Paper*, CER/05/08, 2008.

<sup>55</sup> Department of Industry, Economy and Employment (FDIEE), *Acteurs français de la réglementation et de la régulation*, (in French), 2008, Available at: <http://www.telecom.gouv.fr/rubriques-menu/acteurs/acteurs-francais-reglementation-regulation-365.html> [accessed on 16 June 2008].

ARCEP. The ARCEP's Chairman presides over the committee, and the ARCEP itself ensures the committee's secretarial duties. The committee is a forum for discussion and exchange between the industry's participants on current issues relating to fixed or mobile interconnection.<sup>56</sup>

Similar to the arrangements in Irish energy regulation, in telecommunications the ComReg oversees the operation of some industry and working groups such as the consumer group forum, the numbering advisory panel and the operations and maintenance forum.<sup>57</sup>

In the Netherlands, market participants in telecommunications have a voluntary forum (operated entirely by market participants) designed to deal with issues on access and interconnection outside the OPTA regulatory process. The voluntary forum has had variable success in resolving disputes and much has depended on the composition of the group and the specific issue being discussed. In particular, it has proven useful in relation to such issues as pre-carrier select and MDF access terms.

In the US, the *Federal Advisory Committee Act* enables advisory committees to be established if deemed essential, to provide inputs to public decision making of the federal agencies in certain circumstances and for specified time periods. Pursuant to the Act, the Consumer Advisory Committee (CAC) has been established within the FCC to advise on relevant consumer issues and to facilitate the participation of consumers in regulatory processes. The CAC is sponsored by the FCC and reports to the Chairman of the FCC. The members of the CAC, are appointed by the Chairman of the FCC on the basis of their expertise in certain fields, or representing interests of, consumers and sub-categories of consumers, governments of different levels, and the telecommunications and media industries.

In other industries or sectors, the operation of councils or forums is relatively rare. In water and wastewater, the Japan Water Forum (JWF) is an advisory council chaired by a former Prime Minister and having members covering a broad range of interests such as industry bodies, the housewives association; energy interests (hydroelectricity) and trade unions. In rail, industry participants in the US are represented by the Railroad-Shipper Transportation Advisory Council (RSTAC) which consists of 15 private-sector senior officials representing large and small shippers, and large and small railroads, the Secretary of the US Department of Transportation and the three STB members. Its functions are to advise the STB on regulatory, policy and legislative matters relevant to small shippers and small railroads.<sup>58</sup> Other relevant bodies are the National Grain Car Council and an advisory body on energy resources such as coal, ethanol and other biofuels – the Rail Energy Transport Advisory Council (RETAC).

The nature and frequency of interaction between regulators and advisory groups or bodies can vary substantially. The composition of groups appointed to participate in regulatory forums can also vary and may reflect diverse interests and national characteristics (e.g. workers' unions in France). There is some evidence that some user forums have been influential in the decision-making process in some benchmark

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<sup>56</sup> ARCEP, *Rapport Annuel 2007*, (in French), 2008, Available at: <http://www.arcep.fr/index.php?id=1&L=1> [accessed on 13 August 2008].

<sup>57</sup> ICT Toolkit, *Regulation and Convergence in Ireland*, Available at: <http://icttoolkit.infodev.org/en/PracticeNote.aspx?id=1224> [accessed on 2 June 2008].

<sup>58</sup> Surface Transportation Board, *Rail Consumers-Railroad-Shipper Transportation Advisory Council*, 2001, Available at: [www.stb.dot.gov/stb/rail/railshipper\\_council.html](http://www.stb.dot.gov/stb/rail/railshipper_council.html) [accessed on 25 July 2008].

countries in the past. Interaction between regulators and particular groups may have particular importance at different stages of a market liberalisation process. For example, the Dutch NMa reports that its ongoing interface with stakeholders and groups through its annual market monitoring exercises is particularly useful in areas that have just been opened up to competition.

### ***Initiation of Regulatory Processes by Stakeholder – Petitioning the Rule Maker***

In each of the examples discussed above, representatives of consumers, users and infrastructure providers typically respond to regulatory processes initiated by the regulator or participate in informal consultative activities. In the US, however, stakeholders, including members of the public, are able to initiate regulatory processes directly. For instance, in exercising its delegated executive powers in energy regulation, the FERC has the power to introduce new regulations, developed through its rulemaking process. A petition for a rulemaking can arise from the energy industry, specific companies, stakeholders and the public. In California, the CPUC requires a petition for rulemaking to contain specific proposed wording in the case of a proposed amendment to the regulation, such that an applicant can have a very direct effect on outcomes.

### ***Australian Practice***

In Australia, there are a number of national bodies representing the diverse interests in the infrastructure industries. The major bodies, reviewed below, are generally specific to an industry or a sector, and many are members of the ACCC's Infrastructure Consultative Committee.

In the energy sector, key stakeholders are represented by a number of organisations, including:

- Energy Networks Association (ENA) – a body representing gas and electricity distribution businesses. All of Australia's energy network companies are members of the ENA. Transmission companies are invited to participate.
- Australian Pipeline Industry Association (APIA) – a body that has representatives from the full spectrum of industry participants including contractors, owners, operators, advisers and engineering companies and suppliers of pipeline products and services.
- Energy Users Association (EUA): a body for energy users whose members are primarily business users of electricity and gas. Energy companies and others with an interest in energy matters are invited to participate.

In the telecommunications industry, there are three major interest groups:

- Communications Alliance – a body formed in 2006 that represents members from the communications sector including service providers, consultants and suppliers, as well as business and consumer groups.
- Competitive Carriers' Coalition (CCC) – a body representing the interests of non-dominant telecommunications carriers. Currently there are eight members – Hutchison Telecom, Macquarie Telecom, Verizon Business, PowerTel, Primus Telecom, TransACT, iiNet and Agile Communications.
- Australian Telecommunications Users Group (ATUG) – a body representing business and residential users of telecommunications services. The ATUG is

funded by its members (including carriers, service providers, suppliers, consultants and others) and government sponsorship for individual initiatives.

In posts, there are two major user groups of postal services: the Australian Direct Marketing Association (ADMA) – a body with over 500 members that are industrial users or suppliers of direct marketing services; and the Major Mail Users of Australia (MMUA) – a body that is composed of major mail generators, mailing houses and industry suppliers.

In the water and wastewater industry, there are two main industry bodies: the Water Services Association of Australia (WSAA) – a peak body of the urban water industry with primary membership for water and wastewater services providers and associate membership for other stakeholders in the industry; and the Australian Water Association (AWA) – a body representing water professionals and organisations with a commitment in leadership in sustainable water management.

In rail, the Australasian Railways Association (ARA) represents a wide range of interests of the rail industry in Australia and New Zealand. Its members include rail operators, track owners and managers, and manufacturers of rolling stock and components.

In the airports industry, the Australian Airports Association (AAA), formed in 1982, represents the interests of over 270 member aerodromes and airport in Australia. Corporate and individual memberships for other stakeholders in aviation are also available.

In ports, Ports Australia is a peak body representing the interests of ports and marine authorities in Australia. Its members include all government-owned ports, some private ports, most state marine authorities, the Department of Defence, and the Royal Australian Navy.

The involvement of user groups and industry bodies in the Australian regulatory processes varies by industry or sector.

In the energy sector, user and consumer groups are entitled under relevant legislation to intervene in ACT proceedings (i.e. applications made to the ACT for merits review of certain decisions made by the ACCC and the AER). In addition, a Consumer Advocacy Panel, established in 2001 and re-constituted in 2008, can make grants (particularly for advocacy purposes) and commission research where it would benefit energy consumers (particularly small to medium end users).

In telecommunications, the role of user groups and industry forums has varied over time. Historically, a representative forum was tasked under legislation with producing telecommunications access codes and making recommendations in relation to declared services. The forum had difficulty reaching agreement and the relevant legislative provisions were repealed. To some extent the role has been taken on by the Communications Alliance which has developed an ADR mechanism. However, there is currently limited industry resolution of access issues. The ATUG representing business and residential users of telecommunications services holds formal positions on the Communications Alliance and a number of government advisory bodies, and is a member of the ACCC's Infrastructure Consultative Committee.

In other infrastructure areas, no specific representative bodies or groups are recognised in legislation.



### ***International Practice and Procedure – Key Insights***

A number of areas of international practice may be of relevance to Australia. In particular, there are three areas of potential interest: the establishment of user advocates within the regulatory agency itself; the establishment of industry councils; and the ability of parties to petition the regulator.

#### *User Advocacy Arrangements*

Regulators in some benchmark countries have integrated a user advocacy body, charged with representing users, specific categories of users, or the public in general, within the Agency itself. User advocates may have standing to participate in regulatory proceedings or to act in an advisory capacity in regulatory matters. These advocacy bodies are typically functionally and financially independent from the regulator, and may be given specific powers to fulfil their functions, including rights to information from regulated entities. In principle, integrated user advocacy bodies present an avenue of influence for users over and above the rights to participate in consultation processes within specific regulatory decisions.

However, this raises the question of the extent to which an (appropriately funded/resourced) integrated user advocate might better represent user interests in the context of specific regulatory processes (through informal advice or rights of participation in such process) than is possible under the existing process of consultation.

The answer to the question must be related in part to earlier considerations as to the impact of consultation procedures on regulatory decisions, but also requires consideration of the capacity (time/resources) of users and user groups to participate effectively in consultation processes, particularly vulnerable users/groups. In this regard, it is instructive that in the UK where consumer representation in regulatory processes is particularly strong, a key role of such representation is to represent the interests of particular categories of disadvantaged and/or vulnerable consumers (as well as advocating the interests of the public in general). In this way, the government's regulatory and social policies may be better aligned (notwithstanding the potential for conflict between these goals as noted elsewhere).

#### *Industry Councils*

International practice indicates that one way of improving the input of key stakeholders in regulatory decision making is through the establishment of industry councils comprised of a broad range of interests – including consumers, wholesale purchasers, infrastructure owners, and employee representatives. This approach is used in a number of the benchmark countries, including Japan, France, the Netherlands, Sweden and the US. Such bodies may have a role in apprising regulators of current issues facing participants in their particular infrastructure areas, and facilitating decision making that is informed by a broad consensus or understanding of specific issues. In addition, international experience suggests such bodies may be of particular use in the early stages of liberalisation, and in infrastructure areas characterised by rapid technological innovation.

The benchmark countries offer a variety of 'models' in terms of the composition of these forums, the method of appointment of members, their specific remit, the frequency with which they interact with regulators, and their degree of integration with regulatory structures and personnel. There are, however, obvious risks and trade-offs to be made in each of these choices.

The industry council approach appears to embody a further risk – bodies composed of diverse interests may provide for unwieldy processes and unfocused engagement while narrower representations may be at risk of undue influence, or ‘capture’.

*Petitioning the Regulator*

In the US, in addition to the right to comment on policy and proposed regulations, there is the opportunity for members of the public, interested companies and third parties to petition the FERC (and some state regulators such as the CPUC in California) for rulemaking. Such processes provide a very direct means for stakeholder participation in regulatory processes. A clear risk of such procedures is that the regulator is overwhelmed with vexatious petitions, leading to high regulatory costs.

## **7. Information Collection, Disclosure and Confidentiality**

Across benchmark countries, the powers and processes relating to information collection and disclosure vary by industry or sector and also according to the regulatory process under consideration. Different rules can apply in the context of disputes (and between different methods of dispute resolution), investigations, regulatory applications, and broader monitoring /supervision exercises. While alternative practices need to be moderated for the different circumstances in which they apply, practices observed across the benchmark countries do provide interesting examples for possible consideration in Australia.

### ***Information Collection***

Regulators in all benchmark countries typically have a range of information-collection powers necessary to perform their duties and enforce relevant laws derived from general administrative law or from industry-specific or sector-specific legislation. These can include powers to obtain access to premises, compel the production of documents, conduct interviews and summon attendance at hearings. Empowering provisions show some variation across benchmark countries in the extent to which they contain subjective or objective criteria. For example, the ComReg, in Ireland, can only require the production of documents, where it has reasonable grounds for believing this to be necessary. In France, the CRE has the right to such information as is necessary for its mission. In New Zealand, the NZCC can compel production of any materials it thinks necessary or desirable.

The general regulatory environment (particularly whether it is co-operative or litigious) may be significant in the extent to which information is requested from, and provided by, regulated entities. In Germany, for example, the FNA has never applied to the courts to acquire information from regulated companies. In France, the ARCEP reports that it is rare for there to be objections to questionnaires sent to regulated entities in dispute resolution processes or at other times as part of ongoing surveillance.

In some benchmark countries (the Netherlands, Sweden, the UK), regulators are empowered to impose fines on regulated entities for failing to provide information requested, although there was some evidence that these were imposed infrequently in practice.

Some regulators have adopted particular practices in relation to their information collection activities. For example, in the UK, where an information request is complex, the Ofcom will issue a draft information request and allow three days for identification by stakeholders of the practicality of providing the information within the specified deadline. In the Netherlands, the NMa seeks to provide transparency in the use of its access and information collection powers by publishing operational protocols which set out its methods of operation in relation to company visits, accessibility and the submission of documents. It also publishes its method of operation for investigating digital data – i.e. how it exercises its power to inspect and copy digital data.

The ability to prevent delays was considered by many regulators to be difficult to prevent, but some initiatives can be identified. In the UK, the Ofwat, for example, has stated that, ‘in order to deter regulatory gaming’, it may decide to proceed on the basis

of available facts if parties do not provide information within its specified timescale. In the US the rail regulator, the STB, has mandated that failure to provide information in response to a complaint within a timely fashion results in the claims made in a complaint being admitted. The STB has also established discovery standards in the context of litigation (in order to prevent delays by the incumbent by extending discovery proceedings.)

Annual or ongoing information-provision obligations exist in a number of benchmark countries in a variety of areas; particularly France, the Netherlands, the US, the UK and Sweden.

Such provisions may reflect the surveillance remit of a regulator, or may be required on the basis of particular regulatory arrangements. For example, in the UK, the Ofwat must collect a range of information from regulated entities on an annual basis to compare the performance of companies and to ensure they are meeting the outputs assumed in the price controls.

The most comprehensive annual information-collection exercise identified was in the Netherlands, where the NMa conducts a major annual market monitoring exercise in the energy sector. This exercise requires regulated entities to collect and submit a range of private information such as details of generation supply, including bid data, to the pool, and information on marginal costs. A similar exercise is undertaken by the NMa in rail and by the OPTA in telecommunications. The market monitoring exercises are driven by a statutory duty on the regulators to monitor relevant markets closely and to report to the relevant Minister on the extent to which market forces operate and effective competition occurs in the various markets. The exercises are facilitated by Dutch regulators' substantial information gathering powers. The NMa reports that the ongoing interface with market participants through these exercises allows the agency to identify where its efforts are best placed in the following year. In short, the burden placed on entities is traded off against more directed regulation.

In summary, while regulators typically have a range of statutory information-collection powers, the extent to which information is requested from, and provided by, regulated entities appear to be impacted by a number of practical factors including the general regulatory environment. Annual or ongoing information-provision obligations exist in a number of benchmark countries and may reflect the surveillance remit of a regulator, or may be required on the basis of particular regulatory arrangements. The timely provision of information by regulated entities was identified as an issue in a number of benchmark countries, in particular because of the incentives that incumbents may have to delay determinations on access matters.

### ***Disclosure of Information***

In general, the trend across benchmark countries is for increasing transparency in regulatory processes and greater public access to documents used in these processes. In EU Member States this trend is being driven to a substantial degree by EU Directives. For example, the EU *Framework Directive for Telecommunications* requires the majority of documents submitted and relied upon in the decisions of NRAs to be made accessible to the public. Individual country initiatives also play a role. For example, in the UK which aims at 'best practice regulation', some statutes contain regulatory principles which include, among other things, transparency in process and outcome. In the US, Freedom of Information (FOI) legislation mandates

public access to the information and records of Federal agencies unless the information falls within a specific exception to the Act.

The trend towards transparent processes is more evident in some infrastructure areas than others. For example, regulatory processes in telecommunications appear to have high levels of transparency in all benchmark countries, even in Japan where regulatory processes in other areas tend to lack transparency. Even in telecommunications, however, there are exceptions to the trend in some regulatory processes in some benchmark countries. For example, in France, the ARCEP may not pass on any information gathered from operators in the dispute resolution process to third parties.

While transparency is viewed in most benchmark countries as a laudable goal of regulators, tensions have been identified between the goal of making as much information publicly available as possible and providing information in a manner that is useful for stakeholders. In the UK, for example, the Ofgem has, in recent years, had to reduce the number of documents published on its website (and also reduce the length of documents improve their readability) because of complaints by stakeholders that the volume of documents issued by the regulator was excessive.

#### *Exceptions to Disclosure*

As many of the benchmark countries examined permit disclosure of information collected by agencies unless a basis for exclusion is established, such exclusions are increasingly important. Across benchmark countries, exceptions to disclosure vary but generally include some provision for commercially sensitive (or c-i-c) information.

The determination of what material submitted by a regulated entity should be excluded from disclosure as c-i-c is, in some cases, within the discretion of the regulator. For example, in Germany, the FNA makes a 'case by case' assessment of c-i-c material and no standard rules are applied.; However, in some North American jurisdictions (Canada, California), c-i-c material is given statutory definition. These definitions include information, the disclosure of which will 'prejudice a competitive position' (Canada) or place a company 'at an unfair business disadvantage' (California).

In benchmark countries where ADR processes are encouraged, the regulator can encourage the parties to establish their own confidentiality regime. Such arrangements usually provide for access to the c-i-c information to limited regulatory personnel and external lawyers and consultants, and impose obligations to maintain the information securely and use it only for specified purposes. Such arrangements are permitted or encouraged in telecommunication disputes in Canada, and in ADR proceedings in the federal jurisdiction in the US.

The degree to which the information of regulated entities will be made available to third parties may influence regulatory processes. For example, in Germany, where formal regulatory processes are conducted in the public domain, the FNA considers that the high willingness of parties to participate in its pre-lodgement mediation process reflects (at least in part) a desire by regulated entities to avoid the requirement for publication of details of proceedings.

Regulators in some benchmark countries have adopted specific administrative practices for receiving and dealing with confidential information. In Ireland, the ComReg generally requests that confidential information be submitted separately to a

main submission (which will be published on its website). In Canada, the communications regulator (the CRTC) may order publication of an abridged version of a document. In the UK the energy regulator will exclude, *as far as practical*, the publication of commercially-sensitive information. Another UK regulator, the Ofcom, has commented that a blanket marking of a document as confidential is unhelpful and time consuming for both the Ofcom and the submitter, suggesting it has experienced problems with ambit claims of confidentiality. This problem may be less likely in the US where parties designating material as confidential must do so *in good faith*.

Regulators recognise that confidentiality issues are more likely to arise under some regulatory arrangements than others. For example, in Germany, where incentive regulation is to be introduced, the FNA anticipates an increase in confidentiality issues in the energy sector as companies seek to examine how they have been 'benchmarked' against other operators. The effect of 'benchmarking' systems on disclosure of information between regulated entities, including competitors, is evident in relation to the new *Water Supply Act* in the Netherlands which will make it mandatory for the water companies to measure and compare their cost efficiency on a yearly basis.

Additional exemptions from disclosure exist in some benchmark countries. For example, in Ireland the energy regulator is obliged to keep confidential not just commercially sensitive information but also any information which could adversely affect a party's interests. In the UK exceptions to publication vary across areas, but may include: commercially-sensitive information, information obtained by a third party under a statutory power, confidential information and information that might seriously and prejudicially affect a person's interests.

Transparency issues can arise for regulators where important information is exempt from disclosure for reasons of confidentiality or otherwise. For example, in the Netherlands, the communications-sector regulator (the OPTA) is reliant on the access provider's own fixed-line cost modelling system which is not open to access users. This has led some access users to complain that the OPTA's regulatory process is not sufficiently transparent. To avoid this issue arising in respect of mobile services, the OPTA specifically commissioned its own model for mobile termination.

With respect to publication of c-i-c material, a 'public interest' type determination will outweigh a claim for c-i-c or other claim against disclosure in a number of (common law) benchmark countries (Ireland, the US, Canada, and the UK). Some benchmark countries have developed specific processes in relation to this public-interest determination. In Ireland, where the energy regulator (the CER) deems it in the public interest to publish commercially sensitive or confidential information, it must notify the relevant party and any third parties who may be impacted by the decision, and provide them with an opportunity to respond.

The 'public interest' test may take a varying complexion in different benchmark countries. For example, in the UK, the test seems to be closely aligned to the question of whether disclosure of the information will 'facilitate the carrying out of the regulatory role of the regulator'. The 'public interest' test may also be shaped by the extent of liberalisation of a sector. For example, in the US postal industry, the industry-specific regulator, the PRC, weighs the nature and extent of the likely commercial injury to the USPS against the public interest in maintaining the financial transparency of a government establishment competing in commercial markets.

An appeal from a decision to publish c-i-c material is available in some benchmark countries (Ireland, the Netherlands).

In summary, there is a general trend observed across benchmark countries for increasing transparency and greater public access to documents used in regulatory decision making, although this trend is more evident in some areas than others. In some cases, tensions have been identified between the goal of making as much information publicly available as possible and providing information in a manner that is useful for stakeholders. Across benchmark countries, the determination of what material submitted by a regulated entity should be excluded from disclosure as c-i-c varies. Sometimes, this decision is within the discretion of the regulator, and in some benchmark countries specific administrative practices for receiving and dealing with confidential information have been adopted by regulators. There are additional exemptions from disclosure in some benchmark countries, especially where it may materially affect the interests of a third-party.

#### *Storage and Access*

Regulators' information collection activities and obligations raise storage and access issues, including such matters as the secure storage of confidential information received by regulators and the use of, and access to, computer models used in regulatory processes.

Information on storage and access matters was not available in respect of all benchmark countries, however some initiatives were identified. In New Zealand, the Commerce Commission recently undertook a security review for storing and accessing confidential information. The review resulted in an information security policy, a new visitor log system and improved practices for handling electronic information. A secure electronic evidence environment and upgraded document management system were put in place.

In California, the CPUC has established formal procedures relating to access to computer models used as part of a proceeding. The CPUC rules provide procedures to enable a party to access a computer model or data base used as testimony or exhibits by another party. Access to the model must be provided on a timely and reasonable basis to those seeking access for the purpose of the proceedings.

Information must be provided in relation to the model sufficient to enable an experienced professional to understand the logical processes of the model and any post-processing requirements. The CPUC rules specify that the information provided with the computer model must include a detailed description of the source of all input data. The procedures include requirements for those seeking access to the computer model to explain (in writing) why they require access and various requirements as to when and where such access should take place. The rules also state that if a sponsoring party modifies its computer model or the data base, and sponsors the modified results in the proceeding, such party shall provide the modified model or data to any requesting party who has previously requested access to the original model or data base

All former models must be retained in unmodified form until a specified period (90 days) after the end of proceedings, issuance of the CPUC's last order or decision in the proceeding, including order or decision on application for rehearing, to the extent that those computer models and data bases continue to provide the basis, in whole or in part, for their showing.

In Sweden, information received by the JVS (now the JTA) is stored in a digital case management system and all documents that are received or drawn up on paper are scanned. The agency reports that this has increased its capabilities for rapid and correct information.

Finally, Data Protection legislation impacts on storage and access requirements for information held by regulators in benchmark countries where it is in place.

In summary, various initiatives in relation to storage of, and access to, the confidential information received by regulators can be identified, including the use of information security policies and the establishment of formal procedures relating to access to computer models used as part of a regulatory proceeding.

### ***Australian Practice***

Australian regulators have a range of information-collection powers necessary to perform their duties and enforce relevant laws including powers to obtain access to premises, compel the production of documents and require the collection and provision of specified information on an annual basis. The range of statutory power over information collection varies by industry or sector, dependent on the governing legislations.

In energy matters, the AER is able to: apply to a magistrate for a search warrant; require a person to provide information or documents; and issue a 'regulatory information order' (RIO) that can require a regulated business to provide specified information on an annual basis. In addition, in order to facilitate the decision-making process, the regulatory regimes prescribe detailed information that must be submitted by the regulated business with its proposal. The *Trade Practices Act* also provides for the sharing of information between the ACCC and the AER.

In telecommunication matters, the ACCC may issue directions requiring parties to provide submissions and evidence by specified dates and has the power to summon a person to give evidence or produce documents. The ACCC also obtains information on an annual basis under Part XIB of the *Trade Practices Act*.

In post matters, the ACCC guideline sets out the type of information that Australia Post should provide with a price notification. The ACCC also has the statutory power to compel a person to provide information or documents relevant to a price notification (although, in practice, this power is rarely used). Under the *Australian Postal Corporation Act*, the ACCC receives annual financial information from Australia Post.

In contrast, the ACCC has no power to compel a person to provide information in respect of a proposed rail undertaking. Instead, the ACCC indicates to the service provider the type of information that should be submitted in support of a proposed undertaking; and there is an incentive for parties to provide requested information as the absence of information may lead the ACCC to draw an adverse inference. Similarly, the ACCC does not have a statutory power to compel the provision of information in respect of its informal monitoring of airport car parking prices, but relies upon industry cooperation in fulfilling this function.

The ACCC has the statutory powers to obtain specific information for fulfilling its price notification function (on regional air services at Sydney airport) and formal monitoring functions (on aeronautical services at Sydney, Brisbane, Melbourne, Perth and Adelaide airports). The ACCC has issued a single document on information



requirements for financial reporting and for quality of service reporting on an annual basis. Separate templates for financial information and quality of service information are available.

Practices in relation to the treatment of confidential information differ by industry or sector and by regulatory process.

In relation to information provided in telecommunications arbitration, the ACCC's guideline on the arbitration process states that the ACCC's 'starting point is generally that disclosing information to all parties will facilitate a more informed decision-making process'. However, the ACCC may decide not to give to the other party that part of a document that contains c-i-c information.

In addition, ACCC standard practice is to give a general confidentiality direction at the beginning of an arbitration, and to encourage the parties to agree on a confidentiality regime such as the exchange of a standard-form confidentiality undertaking and the identification of persons to have access to all confidential information. Similar practice is adopted in airports arbitration.

In energy matters, the AER is able to release confidential information if it is of the opinion that the benefit would outweigh any detriment (this decision is subject to merits review).

In postal matters, where information is provided voluntarily, ACCC guidelines set out the process that the ACCC will generally follow in respect of information for which a claim for confidentiality is made. If the ACCC denies the claim, the provider may withdraw the information and the ACCC must not have regard to it in its decision. If the ACCC accepts the claim, the ACCC may give less weight to the material in its decision because it is untested. A similar process is used in rail matters. In addition, ACCC standard practice in rail and some postal matters is to encourage interested parties to agree on a confidentiality regime. There are a number of additional specific provisions governing c-i-c information in postal matters and airport matters. Under these provisions a claim for confidentiality will be defeated if the ACCC determines the claim is not justified or disclosure is necessary in the public interest. The ACCC has issued principles as to how it will apply this test.

The ACCC has a 'clear desk policy' that must be followed by all staff in relation to storage of records and files. This requires that all files classified as c-i-c or protected must be secured when staff members are absent from their workplaces. Spot checks will be carried out and reports made to supervisors regarding items not secured.

### ***International Practice and Procedure – Key Insights***

This section draws insights from practices identified across the benchmark countries in relation to information collection and disclosure that may be relevant to Australian regulatory practice.

#### ***Information Collection***

With respect to requirements for regulated entities to provide ongoing, market-specific information to the regulator for the purposes of market monitoring or surveillance, the ACCC and the AER's requirements are similar to those in most benchmark countries, and appear to be less intrusive than in at least two.

In addition, the amount of information the ACCC and the AER collect from a regulated entity is influenced, in part, by the merits review process, where the review

is limited to the information originally submitted to the regulator (see chapter 8). This is not the case in some benchmark countries, where the appellate entity is not restricted in undertaking a merits review to the material before the initial decision maker, but rather has ‘full investigative rights’. Likewise, the Australian arrangements appear to differ from those in benchmark countries which have established ‘internal’ review processes where separate teams are established within the regulatory agency to undertake a substantive review of the initial decision. In such circumstances, the review team has broad powers, including the power to conduct public hearings. Again, these practices would tend to indicate that information-collection is potentially greater in some of the benchmark countries.

The breadth of empowering provisions also appears relevant to the information-collection process. In Australia, information provision obligations can be imposed by regulatory information order (with specific items detailed) or in accordance with specific legislative provisions in relation to particular regulatory processes. By comparison, regulators in some of the benchmark countries appear to have rights of access to *all* information held by any operator (in the energy market) or any participant (in the communications industry).

The nature of the information-gathering powers, and the frequency with which these powers are used, vary according to regulatory process across the benchmark countries. However, in general terms the approaches of the ACCC and the AER to information collection appear to be less intrusive and narrower in scope than those typically adopted in some of the benchmark countries.

#### *Timeliness of Information Provision*

This issue of how best to facilitate the timely provision of information was common to almost all benchmark countries examined. Aside from the possibility of imposing fines (which appears to occur infrequently in practice), there are a number of initiatives that are being employed to address this issue in the benchmark countries, including basing a decision only on information provided at a particular point in time, or automatically admitting a complaint if a response to an information request is not received by a specific date. In Australia, to reduce incentives for delay in access disputes in telecommunications, the ACCC can make an interim arbitration determination or backdate the effect of the final determination.

#### *Disclosure of Information*

Practices of Australian regulators in relation to disclosure of information accord closely with trends for transparent regulatory processes in North America and among EU Member States. Specifically, this is evidenced by way of the electronic publication of decisions, documents and submissions (subject to confidentiality requirements) in various regulatory processes (other than arbitrations). The trend toward increased transparency in regulatory decision making (and, as a consequence, the increase in the amount of information released by the regulator) has, however, been criticised in some benchmark countries for resulting in an unduly large number of documents being published. This is perceived by some to have created an on-going burden for regulated entities and other stakeholders to ‘keep up’ with the regulator.

#### *Voluntary Information*

Practices of Australian regulators in relation to the treatment of voluntary information differ from the majority of benchmark countries. Information provided voluntarily for which a claim of confidentiality is not accepted by the ACCC must be returned to the

provider, and the ACCC must not have regard to it. If the claim of confidentiality is accepted, the ACCC may give lower weight to the information because it is untested. Principles governing the treatment of information provided to a regulator voluntarily were identified only in Ireland, where the communications regulator (the ComReg) assesses whether information provided to it voluntarily has the necessary quality of confidence by considering three matters – whether the provider *reasonably* believes the material is confidential; whether the provider believes the release of the information will disadvantage it or advantage others; and common practice in the telecommunications market with respect to the material in question.

#### *Publication of c-i-c Material*

In Australia, the ACCC has issued principles as to how it will determine whether to publish c-i-c material. Practices include providing opportunities for merits review of such decisions, providing opportunities to retract confidential information provided voluntarily, and publishing principles in relation to how the public interest test will be applied. Australian practice in making determinations regarding publication of c-i-c material demonstrates high levels of procedural fairness relative to many of the other benchmark countries examined. The exemptions to disclosure, including exemptions for confidential commercial information, appear to be similar and consistent in scope to exemptions in most other benchmark countries. The only practice identified from benchmark countries which appears to provide additional protection for those affected by disclosure is the practice of the energy regulator (the CER) in Ireland to notify, not just the relevant party, but also any third parties who may be impacted by the decision, and provide them with an opportunity to respond.

#### *Storage and Access to Information Collected*

It is clear from the review that storage and access issues have arisen in a number of benchmark countries. In addition, storage and access requirements for information held by regulators appear to be impacted by Data Protection legislation in an increasing number of benchmark countries. A number of initiatives to address storage and access issues can be identified from the review. In particular, some regulatory agencies are seeking to improve transparency in information-collection procedures through the publication of operational protocols that set out their methods of operation in relation to such matters as company visits, accessibility and the submission of documents, and for inspecting and copying digital data. Other regulatory agencies have developed and introduced formal information security policies, including creating secure electronic evidence environments and upgrading document management systems.

#### *Access to Computer Models*

To provide timely and appropriate access to computer models or simulations employed as part of regulatory proceedings, some regulators have introduced formal access procedures. These include requirements regarding: the type of supporting information that must be provided with the model; requirements that any modifications to the model be provided to all access parties; and, finally, that the model be made available on a timely and reasonable basis for the purpose of the proceedings. These enhanced access arrangements are potentially of relevance to the ACCC and the AER.



## 8. Appeals

An appeals process is generally regarded as important to ‘ensure that the regulator does not stray from its mandate’.<sup>59</sup> While all the benchmark countries have appeal mechanisms across all major infrastructure industries subject to economic regulation, the type of appeal mechanism varies widely. This chapter first discusses the possible designs for appeals processes, and identifies patterns across the benchmark countries. This discussion serves as a background for the consideration of ideas about appeals that might be of relevance to Australia.

### *Forms of Appeals*

There are two basic forms of appeals: a determination of the legality of a regulatory decision (sometimes called ‘judicial review’ that is only concerned with whether the decision has been lawfully made); and a review of a regulatory decision on its merits (sometimes called ‘merits review’ that enables the review of all aspects of a decision including findings as to facts and the exercise of due discretion).<sup>60</sup> However, the design of an appeal mechanism also requires consideration of the following:

- What decisions should be subject to appeal? For example, merits reviews may not be available in respect of every regulatory decision.
- Whether the form of appeal should be restricted in some way. For example, in the case of merits review, the appeal body may be limited to considering whether ‘there exist reasonable grounds’ for the decision under appeal (as distinct from considering the matter afresh).
- The nature of the appeal body. An appeal process could be conducted internally within the regulatory agency, or by an external body (for example, a court, tribunal, minister, other government agency or an individual). The appeal body may be specialised or have a general practice.
- Rights of appeal (standing). The right to appeal could be limited to the regulated entity, persons who participated in the original decision-making process or, more generally, persons who are affected by the regulatory decision.
- Participation in the appeal process. Other parties (such as the regulator, a minister, other government agencies, private parties or representative bodies) may be permitted, or required, to participate in the appeal process. The role and resources of the participating parties may vary.
- The type of dispute resolution system and the remedies available. Appeal processes can range from: an adjudication (where the appeal body has the power to impose a binding decision); an expression of opinion or recommendation (sometimes described as expert appraisal or case presentation); mediation, conciliation or facilitation; to a dispute resolution hierarchy (where there are multiple stages in the appeal process). Where the appeal body is able to make a binding decision, the body may be able to substitute its own decision for that of the original decision-maker, or may be able to return the decision to the original decision-maker to be re-made in accordance with the appeal body’s directions.

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<sup>59</sup> Warwick Smith, ‘Utility Regulators – Decisionmaking Structures, Resources, and Start-up Strategy’, *Public Policy for the Private Sector*, 129, World Bank, Washington, October 1997, pp. 1–4.

<sup>60</sup> In the Australian context, the judicial review powers are vested in the court while the merit review powers are vested in the Commonwealth merits review tribunals.

The appeal body may also be able to make other associated decisions, such as requiring one party to compensate another.

- The conduct of the appeal process (including the degree of formality). This includes: what material should be provided (for example, whether the material should be restricted to what was before the original decision-maker; if the material should be exchanged between the parties; and if the appeal body has an investigatory role); how that material should be presented to and considered by the appeal body (for example, whether parties should have the opportunity to make oral submissions, and if the process is conducted privately or publicly); and the time limits that apply (for example, the time within which an appeal must be lodged or for the appeal process to be concluded).

### ***Patterns across the Benchmark Countries***

Appeal arrangements across benchmark countries appear to be driven by two key factors – the country’s model of government; and the extent to which an infrastructure area is privatised and open to competition.

#### *Model of Government*

Under the model of separation of powers, a state is divided into branches or estates, each with separate powers. The normal division of branches is into an executive, a legislature, and a judiciary. Where there is a strict separation of judicial power, the review of the legality of a regulatory decision must be performed by a body (usually called a court) separate from the body that reviews the merits of the decision (sometimes called a tribunal).

Constitutions with a high degree of separation of judicial power include the European Union (where the European Court of Justice acts as the independent judicial branch); United States of America; Australia (although only at the Commonwealth level); Japan (where the Constitution vests judicial power in the Supreme Court and in such lower courts as high courts and district courts); and France (although, in France, the separation of powers is regarded differently as allowing judicial review of administrative but not legislative acts).

In countries where there is less separation of judicial power, there is no dominating model of review. In some cases, the court which hears the appeal is limited to judicial review. For example, in the New Zealand electricity regime, the High Court may exercise any of the regulator’s powers, but, until October 2008, was limited to reviewing the legality of the decision. In October 2008, the *Commerce Act 1986* was amended to allow the High Court to review the merits of certain determinations by the Commerce Commission including on input methodology. In the Canadian energy regime, decisions by the NEB may be reviewed by the Federal Court of Appeal but only on matters of law or jurisdiction.

In other cases, the court at first instance considers both the merits and legality of the regulatory decision. Examples include the German energy regime (where appeals are dealt with in the first instance by the Higher Regional Court of Düsseldorf); the Irish telecommunications and postal regimes (where appeals are heard by the High Court); and the Netherlands (where appeals are generally heard by the Court of Appeal).

Yet in other cases, the merits of the decision are reviewed by a body that is separate from the court system. An example is the Irish airport regime, where the Minister appoints a special appeal panel consisting of three to five members to review appeals.

In the UK, the CAT reviews decisions by the OFT under competition law, and the decisions of regulators in telecommunications, electricity, gas, water and wastewater, railways and air traffic services. Another example is the Canadian Competition Tribunal, which hears applications filed by the Canadian federal competition regulator, the Competition Bureau.

In contrast, where there is a high separation of judicial power, merits review is usually an intermediate step in which appeals go to an executive body, such as the ACT in Australia, before going to a court for judicial review. However, merits review is not necessarily available. In France, for example, energy, telecommunications and post decisions are subject to judicial review, but not to merits review by the *Paris Court of Appeal* (a regular civil court). In the US, the Court of Appeals reviews decisions by the energy regulator, the FERC, although there is an extensive review process within the regulator which is further discussed below.

Where a review (merits and/or judicial) is conducted by a court, there is no clear trend towards general or specialised practices. Examples of the former include the New Zealand High Court;<sup>61</sup> the Irish High Court; the Swedish County Administrative Court; and the Canadian Federal Court of Appeal. Examples of the latter include the Cartel Senate in the German Higher Regional Court of Düsseldorf (which deals with general competition law and energy appeals); and the Netherlands specialised chamber of the Court of Appeal, known as the College of Appeals for Business.

However, where the review is conducted by an executive body, this body is generally expected to have more specialised expertise than the courts. Examples include the Australian Competition Tribunal and the UK CAT. In the CAT, cases are heard by a panel consisting of three members; either a senior lawyer or a judge of the Chancery Division of the High Court; and two other members who have expertise in law and/or related fields.

#### *Privatisation and Liberalisation*

A second key factor impacting on the design of a country's appeal processes is the extent to which the area has been privatised and is open to competition, particularly where investors operate multinationally.

Liberalisation and privatisation is usually accompanied by extensive regulation. The profitability for investors depends upon the terms and conditions of access. Unless a government has made a credible commitment to the regime (by clearly defining the regime in laws and the main transaction documents such as contracts of sale, and allowing review of regulatory decisions), private investment could be deterred or require higher prices.

The global trend of utility privatisation has also been accompanied by increased use of independent regulatory authorities, that are at arm's-length from political authorities, regulated firms and consumers, and that have the attributes of organisational autonomy such as appointments for a fixed term and a reliable source of funding. Where the regulatory agency is independent, the appeal body is usually also independent. Two notable exceptions to this include Japan and Canada. Under the Japanese telecommunications regime, the Minister conducts an investigation upon receiving a request by a party who is dissatisfied with an administrative decision

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<sup>61</sup> However, in respect of appeals from Commerce Commission determinations, the High Court is constituted by a judge and at least one lay member. Lay members are appointed by the Governor-General, and have expertise in areas such as economics or commerce.

made by the TBDSC (although the Commission is within the MIC). Under the Canadian telecommunications regime, the government may rescind or alter the regulator's (the CRTC) decision. Under the Canadian rail regime, parties may appeal decisions by the CTA to the Governor in Council. However, these rights of appeal have been used only sparingly.

### ***Merits Review in Australia***

Australia's experience with merits review of regulatory decisions is still relatively new. Australia has followed the tradition in the UK of superior courts reviewing the legality of enactments and government administrative decisions. However, the creation of a right to merits review was not widespread until the 1970s.

Since 1974, merits review has been available for authorisation decisions (made under Part VII that allow a party to engage in conduct that would otherwise contravene the competition law provisions in Part IV of that Act) made by the Trade Practices Commission and its successor, the ACCC. The review is conducted by the Trade Australian Competition Tribunal (previously named the Trade Practices Tribunal), a Commonwealth statutory body consisting of a president and deputy presidents (who are also required to be judges of a federal court) and 'lay members' (who have industry or economic expertise).

In 1995, as part of the national competition reforms, the general access regime was inserted into Part IIIA of the *Trade Practices Act 1974*. While it was originally proposed to limit appeals against the arbitrator's decision to matters of law, the regime provided for full merits review by the ACT of declaration and arbitration decisions. Following a review by the PC, merits review was extended in 2006 to undertaking decisions.

When the telecommunications-specific access regime (Part XIC) was inserted into the *Trade Practices Act* in 1997, most decisions were subject to full merits review, including decisions on access undertakings and arbitration of access disputes. In contrast to Part IIIA, declarations under Part XIC have never been subject to merits review (although exemptions from the access obligations are). In 2002, Part XIC was amended following a review by the PC. These amendments reduced the availability of merits review in two respects – merits review was removed from arbitration decisions; and merits review of other Part XIC decisions was limited to the material before the ACCC, and indicative time limits of six months were introduced. These amendments were intended to reduce the cost and delay associated with merits review.

Since its commencement in 1998, the national gas access regime (*National Gas Pipelines Access Law*) provided for merits review by the ACT of ACCC decisions on gas access arrangements. However, the merits review was restricted in terms of the grounds of review and the material the ACT could consider. In relation to grounds, the ACT could only set aside the ACCC's decision if there was an error in a finding of fact; the exercise of discretion was incorrect or unreasonable in all the circumstances; or the occasion for exercising discretion did not arise. In contrast, revenue cap decisions by the ACCC under the former National Electricity Code were not subject to merits review.

In 2005, the National Electricity Code was replaced by the National Electricity Rules (NER). The ACCC's regulatory functions in electricity were transferred to the AER. In 2008, the electricity framework was replicated in a new *National Gas Law*



(including the transfer of gas regulation to the AER). The MCE decided upon a limited merits review for both gas access arrangement and electricity determinations by the AER.<sup>62</sup> In summary:

- The grounds are limited to the first two grounds under the earlier gas regime. The third ground ('occasion for exercising the discretion did not arise') has been removed.
- The ACT cannot grant leave to appeal unless: the applicant had made a submission (on time) to the AER; and the disputed amount exceeds the lesser of \$5 million or 2 per cent of the average annual regulated revenue.
- The ACT is restricted to the material that was before the AER to determine whether a ground of review has been established. However, new information may be submitted (subject to conditions) once the ACT is of the view that a ground of review has been established. This approach is intended to recognise 'that there may be ... fresh facts or other material which could materially assist the [Tribunal] in reaching a correct or preferable decision'.
- The ACT has an indicative time limit of three months.

More broadly, in 2005, a report on Australia's export infrastructure concluded:<sup>63</sup>

As a general matter, where regulators rely on coercive powers to override property rights, there is a compelling case for providing effective and extensive rights of appeal. ... However, it is also important to ensure that decisions are timely. One change that would help ... is to allow merits review but require that it be 'on the documents'. ... Given a restriction of merits review to a review on the documents, there is no reason for the review process to take more than six months.

Following this report, Australian governments agreed in 2006 that, where merits review of regulatory decisions is available, the review will be limited to the information submitted to the regulator.<sup>64</sup> In 2007, this was revised to allow the review body to admit new information in limited circumstances.<sup>65</sup>

This trend towards merits review of regulatory decisions by the ACT reflects three broader factors. First, the Australian Constitution requires a strict separation of judicial power from Commonwealth legislative and executive powers. Only a court constituted in accordance with the provisions of the Australian Constitution can exercise judicial power. If merits review is available, it must be conducted by an executive body (although, this separation of power is blurred by requiring the presiding member of the ACT to also be a judge of a federal court).

Secondly, since 1975, the Commonwealth has progressively adopted a general policy that, as a matter of principle, an administrative decision that affects the interests of a

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<sup>62</sup> Ministerial Council on Energy, *Review of Decision-Making in the Gas and Electricity Regulatory Frameworks*, May 2006, p. 26.

<sup>63</sup> Exports and Infrastructure Taskforce, *Australia's Export Infrastructure*, Report to the Prime Minister, Canberra, May 2005.

<sup>64</sup> *Competition and Infrastructure Reform Agreement*, 10 February 2006, Clauses 2.4–2.5.

<sup>65</sup> Clause 6(5) of the *Competition Principles Agreement* (11 April 1995, amended 13 April 2007) provides that where merits review of decisions is available, the review will be limited to the information submitted to the original decision-maker except that the review body: (i) may request new information where it considers that it would be assisted by the introduction of such information; (ii) may allow new information where it considers that it could not have reasonably been made available to the original decision-maker; and (iii) should have regard to the policies and guidelines of the original decision-maker (if any) that are relevant to the decision under review.

person should be subject to merits review. However, certain categories of decisions are excluded, notably decisions to institute proceedings; policy decisions of a high political content; and decisions involving extensive inquiry processes.<sup>66</sup>

Thirdly, while the Commonwealth's approach to the creation of generalist or specialist tribunals has varied over time, the general policy is that review bodies should be independent from the government agencies whose decisions they are reviewing. Such independence is regarded as essential to the credibility of the merits review system.<sup>67</sup> In contrast, limiting the grounds of review, excluding new information and imposing time limits, is not a common practice across Commonwealth merits review tribunals.

### ***International Practice and Procedure – Key Insights***

Within the constraints sets out above, there are three areas of international practice which are of particular interest to Australia – the use of alternative dispute resolution; the expedition of merits review; and the respective roles and resources of parties participating in merits review processes.

#### *Alternative Dispute Resolution*

One of the priorities of the Commonwealth government is access to justice, including ensuring that the system is practical, cost efficient and facilitates the timely resolution of disputes. In 2008, the Government asked the Office of Legal Services Coordination to develop a survey of the use of ADR in Commonwealth litigation. The survey will initially focus on civil matters, but will later be extended to include regulatory and enforcement matters. The object is to encourage agencies to reassess their use of ADR, and to identify good practices that can be shared across agencies.<sup>68</sup>

More specially, in the regulatory area, Australian governments reaffirmed in 2006 that, in the first instance, terms and conditions for access to infrastructure services should be commercially agreed between the access seeker and infrastructure operator.<sup>69</sup> This principle underlies existing access regimes including Part IIIA of the *Trade Practices Act* (airports, water and rail); Part XIC of the *Trade Practices Act* (telecommunications); and the *National Gas Law*. However, the economic literature suggests that the incentives for parties to negotiate such terms and conditions can vary depending on such things as the characteristics of the market (including the extent of market power and vertical integration); institutional dynamics encompassing the credibility and extent of the threat (the backstop) if the negotiation fails; the patience of the parties, information imbalances, uncertainty and the number of parties to the negotiating process.<sup>70</sup> Where there is a sharp asymmetry of interests between parties (including the regulator), a rights-based mechanism (where an independent third party

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<sup>66</sup> See Commonwealth of Australia, Administrative Review Council, *What Decisions should be Subject to Merit Review?*, Available at: [http://www.ag.gov.au/agd/WWW/arcHome.nsf/Page/Publications\\_Reports\\_Downloads\\_What\\_decisions\\_should\\_be\\_subject\\_to\\_merit\\_review#alloc](http://www.ag.gov.au/agd/WWW/arcHome.nsf/Page/Publications_Reports_Downloads_What_decisions_should_be_subject_to_merit_review#alloc) [accessed on 11 December 2008].

<sup>67</sup> See Administrative Review Council, Report to the Minister for Justice, *Better Decisions: Review of Commonwealth Merits Review Tribunals*, Report No. 39, AGPS, Canberra, 1995.

<sup>68</sup> Australia, Commonwealth Attorney-General, The Hon. Robert McClelland MP, *ADR in Government Forum*, Canberra, 4 June 2008.

<sup>69</sup> *Competition and Infrastructure Reform Agreement*, 10 February 2006, Clause 2.2.

<sup>70</sup> See the literature review in H. Gray, C. Malam & A. Naughtin, *Facilitating Access Negotiations: A Report for the Infrastructure Consultative Committee*, 1 June 2007.

makes a binding determination according to some objective standard) is more likely to be required to resolve the dispute.<sup>71</sup>

In this context, it is of interest to review the use by other countries of alternative mechanisms to resolve disputes over regulatory decisions. These include internal review by the regulator and ‘interest-based processes’ to dispute resolution (such as negotiation and mediation) that focus on reconciling the underlying interests of the parties with the aim of producing an agreed outcome. Examples from the benchmarking countries include the following:

- The Dutch NMa is responsible for enforcing the *Competition Act 1997* and undertaking regulation of the energy and transport sectors. All decisions of the NMa may be appealed to the Netherlands court system. However, a feature of the appeals process is the ‘Objections Procedure’ which allows for a separate section of the NMa (the legal department) to reconsider a decision prior to any action being taken to court. According to the NMa, in approximately 50 per cent of decisions, the NMa has altered its views as a result of this process. This procedure is faster than a typical appeal process (the NMa has six weeks to undertake an Objections Procedure whilst the court process typically takes around one year), and allows the regulator and interested parties to reconsider their positions outside the formal court process.
- In the Swedish rail regime, to appeal a decision, a party must provide a written submission (outlining the points of disagreement) to the regulator. If the regulator does not amend its own decision, the appeal is forwarded to the County Administrative Court.
- In the Canadian federal energy and telecommunications regimes an applicant may apply to the regulator (the NEB or the CRTC, respectively) for a review of the original decision (including, in the case of energy, on the grounds that the correctness of the original decision is doubtful).
- The US energy regime provides that the regulator (the FERC) can be requested to rehear a disputed decision. The administrative hearing is conducted by a FERC Administrative Law Judge under Rule 603, and is often lengthy and expensive. To address this, an initial pre-hearing conference is conducted at which the presiding judge will advise the parties of available ADR processes, and take a recess in order for the parties and FERC trial staff to explore privately and off-the-record, the desirability of using one of the ADR procedures in the case. If the parties agree to pursue ADR, the hearing schedule may be suspended. If ADR processes are not pursued, the complaint is set for hearing. This arrangement appears to be reversed in telecommunications where the initial decision is made by the presiding Administrative Law Judge within the regulator (the FCC), which may then be appealed to the regulator.

In Australia, ‘internal review’ (where merits review is undertaken by another officer within the same agency) is common in areas such as social security, migration and taxation, but not for regulatory decisions. This may reflect differences in the extent to which the making of the original decision is delegated within agencies to staff. Internal review can potentially act as a filter to parties pursuing resource- and time-

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<sup>71</sup> W. Felstiner, R. Abel, and A. Sarat, ‘The Emergence and Transformation of Disputes: Naming, Blaming and Claiming’, *Law and Society Review*, 15, 3-4, 1981, pp. 631–654; L. Ross and C. Stillinger, ‘Barriers to Conflict Resolution’, *Negotiation Journal*, 7, 4, 1991, pp. 389–404.

consuming external review, and may provide a useful quality control mechanism for the regulator. However, it also has the potential to delay further the regulatory process.<sup>72</sup>

#### *Expediting Merits Review*

The Exports and Infrastructure Taskforce recognised the tension between timely processes and providing opportunities for merits review. The compromise has been to limit the grounds of merits review, restrict the information before the appeal body, and impose time limits. The restriction on new information is intended to shorten the length of the proceedings, and provide parties with stronger incentives to submit to the regulator all the material relevant to a proper consideration of the facts. However, arguably, this also protracts the original decision-making process as parties must ensure that, for every issue that could conceivably arise in a review, all the material is before the ACCC/AER.

It is interesting to note that the French *Paris Court of Appeal* (a regular civil court which reviews energy, telecommunications and post decisions) is required to deliver a decision within four months of the appeal being lodged. The Irish special appeal panel (which is appointed by the minister to review airport decisions) has three months in which to accept or reject the decision. However, most appeal processes appear to take around 12 months. Examples include the German Higher Regional Court of Düsseldorf (which reviews the decisions of the Federal Network Agency) and the Netherlands Trade and Industry Tribunal (which reviews market analysis decisions in telecommunications and post).

#### *Participation in Merits Review*

The principal function of a standing rule is to limit access to the appeal body. Traditionally, in Australia, the right to apply for judicial review of a decision is restricted to a person who is adversely affected by the decision. In particular, this may exclude representative bodies that are not directly affected by the decision.

The parties to the proceeding are the applicant for judicial review, and the ACCC/AER (respondent). The basic principle is that, ordinarily, the ACCC/AER should not contest proceedings for judicial review, and should maintain its impartiality.<sup>73</sup> However, where there is no other contradictor, the ACCC/AER may be more actively involved in making submissions and adducing evidence.

The court may also order another person to be joined as a party, or give leave to a person to intervene in the proceeding (Federal Court Rules Order 6). However, end users, in particular, may face a 'collective action' problem. End users are less likely to be represented where the access charge is a relatively small percentage of the end-user charge.

Until recently, regulatory regimes in Australia did not include special funding arrangements for representative bodies. In 2007, the Consumer Advocacy Panel was established to make grants (particularly for advocacy purposes) and commission research where it would benefit energy consumers (particularly small to medium end users). The gas and electricity regimes were amended expressly to provide for

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<sup>72</sup> Australian Law Reform Commission, *Federal Civil and Administrative Penalties in Australia*, Report No 95, 2002, Chapter 20.

<sup>73</sup> The principle derives from *R v Australian Broadcasting Tribunal; Ex parte Hardiman* (1980) 144 CLR 13.

intervention by user and consumer groups in Tribunal proceedings. In this context, the establishment by legislation of consumer bodies (discussed in chapter 6 above) in the UK – where consumer representation in the regulatory process is strong – is of particular interest.



## Conclusion

In undertaking this work, the ICC aimed to achieve a greater overall understanding of the practice of the economic regulation of infrastructure and to use this understanding to inform and potentially improve the regulatory practice of the ACCC and the AER. In regulatory processes and practices Australia certainly appears to be amongst the leaders rather than the laggards. Numerous interesting ideas for new practices and processes have flowed from this work, but taken together these ideas are not suggestive of the need for major overhaul of existing regulatory practices.

In this project, the country-based reports were developed to be readable, descriptive overviews of the regulatory practices and processes of different countries, and from these studies the final report has developed a range of insights for Australia which are discussed at some length in the previous pages.

After all this work, the clear conclusion is that the project cannot stop here. There has already been feedback that country-based reports are an important source of reference to be used in diverse ways. However, regulatory regimes and practices are dynamic, not static – in the course of this project revisions have continually been required to accommodate changes made to different regulatory regimes. This will have to continue if the country-based reports are to retain their value as a reference document.

Also, it is not clear that the study should be restricted to the eleven selected countries. This type of work is enriched by comparisons. When the study was first scoped the list of benchmark countries was shorter. The Advisory Committee suggested additional countries – these additions have more than earned their place in the study. The conclusion drawn from this experience is that a more complete coverage of OECD countries would make for some even more interesting insights.

While robust arguments for broadening can be made, it also seems quite clear that some issues need to be tackled in a different way and in more depth with an even more micro approach than has been possible here. Looking at the controversial issue of time taken to make decisions, it has been possible to look to the legislation and to determine whether timelines are imposed for the completion of a particular function, and whether stop-the-clock clauses are provided in the legislation. However, the study has not been able to ascertain what is the actual time taken between the initiation and completion of a decision – that is, it has not been able to observe how legislative timelines are observed in practice. To answer this question, a series of detailed case-studies and perhaps a survey across the benchmark countries, may be the best approach.

Summing up, the ground work has been done in an important area of work to situate Australia's regulatory design, processes and practices within an international context. As well as providing a number of insights for Australian economic regulation, this report indicates the direction for further work.





## Authorship and Research

This report is a project of the Infrastructure Consultative Committee (ICC) written and researched by ACCC staff, part-time research staff and an external consultant in collaboration with an Advisory Committee of the ICC. External consultants were also used in reviewing drafts of the report.

The report was written by Rob Albon, Chris Decker, Harriet Gray, Lin Johnson, Anne Plympton and Su Wu. Rod Shogren acted as an external reviewer providing advice on the development and structure, scope and content of the report, while Chris Decker, in addition to drafting sections, reviewed the entire report.

The research for the country-based review has been conducted by all those above, plus Katrina Evans, Rebecca Gill, Kara Lamm, and Susannah Stanford.

An Advisory Committee of the ICC was established to assist with the project. Its membership is drawn from the ICC to reflect the key industry areas covered by the study. It has provided expertise and guidance to the project team. Members of the Advisory Committee are:

Andrew Blyth, CEO, Energy Networks Association (replaced Garth Crawford in June 2008)

Cheryl Cartwright, CEO, Australian Pipeline Industry Association (alternate, Steve Davis)

David Forman, Executive Director, Competitive Carriers Coalition

Brett Hughes, Manager Policy, Australasian Railway Association (from January 2009)

Anne Hurley, CEO, Communications Alliance Ltd

Tom Mollenkopf, CEO, Australian Water Association

Genevieve Pound provided editorial assistance in earlier stages of the project.