2007 KDI International Conference

Competition Policy in Regulated Sectors:
Focusing on the Institutional Design of the Relationship between Competition Authority and Sectoral Regulators

규제산업의 경쟁정책:
각 산업의 감독당국과 경쟁당국 간 관계에 대한 제도 설계를 중심으로

July 10~11, 2007

Main Conference Hall
Korea Development Institute

KDI

Australia's Experience with Competition Policy Reform and Its Institutional Implementation

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Korea Development Institute International Conference

Competition Policy in Regulated Sectors: Focusing on the Institutional Design of the Relationship between the Sectoral Regulators and the Competition Authority

10-11 July 2007, Seoul, Korea.

Synopsis

Australia's primary tool for promoting competition is the *Trade Practices Act 1974* (TPA), which is enforced by the national competition regulator, the Australian Competition and Consumer Commission (ACCC). Australia has avoided some of the problems in defining relationships between the competition regulator and sectoral regulators by giving the ACCC overall regulatory responsibility for enforcing competition laws as well as determining monopoly infrastructure access terms and conditions and undertaking economic regulation of much nationally significant network and other monopoly infrastructure. Hence, the ACCC regulates access to and prices charged by monopoly network assets supplying gas distribution, electricity transmission, fixed wire telephone, inter-state rail and some airport services. Financial sector regulators such as the Australian Prudential Regulatory Authority and Australian Securities and Investments Commission and sectoral regulators like the Australian Communications and Media Authority are responsible only for technical regulation of the sectoral institutions specified in their legislation. The paper discusses the nature of the relationship between the competition authority and the sectoral regulators, the mechanisms used to ensure this relationship operates smoothly and recent reforms in this area.

While competition legislation is designed to prevent anti-competitive activities by private firms, the behaviour of government owned enterprises, government legislation or regulations also can undermine or even prohibit competition in some markets. Since 1995, Australia's National Competition Policy has aimed wherever possible to remove such competition barriers by subjecting all government owed enterprises carrying out a business to the competition provisions of the Trade Practices Act. National Competition Policy also requires the Commonwealth, State and Territory governments to repeal or amend all legislation that restricts competition, unless this restriction can be shown to be in the community's interest, and to restructure, corporatise or privatise their government owned monopolies so they operate on a more equal footing with private firms operating in the same sector. Under National Competition Policy government enterprises also were required to hand over any economic or technical regulatory responsibilities to independent technical, economic or competition regulators including industry regulators, multi-sectoral state regulatory bodies or the ACCC. The independent Australian Government body, the National Competition Commission (NCC) was established to monitor implementation of National Competition Policy and make recommendations on whether jurisdictions should receive reform incentive payments, National Competition Policy payments, and on whether third parties should be given access to monopoly infrastructure. This paper discusses the institutional arrangements designed to implement

National Competition Policy, including competition payments, the relationship between the NCC, ACCC and sectoral regulators, and their impact on the competition reform program's effectiveness.

NATIONAL COMPETITION LEGISLATION

Like most developed economies and many developing economies, Australia's primary tool for promoting competition is its competition policy law, the Trade Practices Act 1974 (TPA). The objective of the TPA is to enhance the welfare of Australians through promoting competition and fair trading and providing consumer protection.

Supporting competition between businesses

In promoting competition, the TPA prohibits arrangements between competitors, including cartels, which substantially lessen competition, divide markets, restrict output or fix prices. The TPA also prohibits mergers and acquisitions which would have the effect, or likely effect, of substantially lessening competition in an Australian market. As unilateral conduct by firms also can harm competition, the TPA prohibits misuse of market power, exclusive dealing and resale price maintenance, including predatory pricing, agreements that give rise to primary or secondary boycotts, vertical relationships and tie-in sales, known as third-line forcing and some mergers or acquisitions. These arrangements and conduct are prohibited because they restrict competition in ways that are harmful to consumers by increasing prices, stifling innovation, or enabling producers to produce goods of inferior quality. The Act also prohibits unconscionable conduct, taking unfair advantage, in commercial transactions between businesses and prohibits corporations from engaging in unconscionable conduct in their dealings with small business consumers. It provides a number of factors the court can consider to determine if unconscionable conduct has occurred, including relative strength of the bargaining positions and the whether any undue influence or pressure was exerted on the small business consumer.

Further information in relation to Australia's competition laws can be obtained from the ACCC's website at www.accc.gov.au.

Delivering benefits to consumers

One of the principle aims of the TPA is to prohibit corporations from engaging in specific practices likely to undermine consumers' trust and confidence in the market. These practices include:

- prohibiting unfair trading practices such as misleading and deceptive conduct, or conduct which is likely to mislead or deceive

- prohibiting misrepresentations of the product's characteristics or price, including misrepresenting a good's country of origin

- prohibiting bait advertising or pyramid selling

- ensuring businesses comply with product safety standards

- making manufacturers and importers liable for defective goods

- prohibiting unconscionable conduct by businesses in their dealings with consumers.

The Australian Treasury has responsibility for assisting Ministers to ensure the TPA remains up to date and relevant, reflecting community, business and consumer expectations.
The States and Territories have also passed acts which contain similar prohibitions to the TPA to ensure that non-corporate entities and individuals are also prohibited from engaging in these practices.

ROLE OF AUSTRALIA'S COMPETITION REGULATOR

Successful competition policy requires appropriate policy oversight by government agencies and enforcement by regulatory authorities to identify anti-competitive behaviour, to prevent it and to identify and remove any legal and regulatory barriers to competition. It is important to business and consumers that regulatory authorities are independent of the government. This is best achieved by separating the regulator from the policy making process, by allowing those subject to competition policy to appeal regulatory decisions in the courts and by governments making appointments to the regulatory bodies' executive positions after consultation with stakeholders and with the consent of the legislature. Independent regulators' terms of reference should require them to provide independent analysis and advice, use transparent processes and promote the well-being of the community as a whole rather than particular industries or groups.

Australia's competition regulatory authority's roles include:

- investigating complaints from enterprises, customers or consumers about alleged violations of the competition policy law and taking legal action as appropriate
- authorising anti-competitive conduct where it has a net public benefit
- determining the terms and conditions of third parties' access to monopoly facilities, including regulating the prices of monopoly service providers and resolving access disputes
- implementing competitive neutrality mechanisms to ensure government enterprises are not advantaged compared private enterprises in the same industry.

Australia's independent competition and consumer policy regulator the Australian Competition and Consumer Commission (ACCC) was established in 1995 by the Commonwealth Parliament to protect the rights of consumers and business. It does this by encouraging vigorous competition in the marketplace and enforcing consumer protection and fair trading laws, in particular the Trade Practices Act. The ACCC also regulates important national infrastructure markets where the

presence of monopoly networks can make competition ineffective, for example, the electricity, gas, telecommunications and inter-state rail network services markets. As well as enforcing the law, the ACCC provides information and education to businesses and consumers about the laws it administers. The ACCC is an independent statutory authority which means that while it is essentially a government organisation, it acts independently of government. The ACCC's legislation requires it to apply the Trade Practices Act without fear or favour to achieve universal compliance (www.accc.gov.au).

Independent Review Bodies

In Australia the Australian Competition Tribunal and the courts fulfil the role of independent review bodies. The Australian Competition Tribunal is a Commonwealth government body with three independent part time commissioners appointed by the government and a small secretariat which reviews the competition regulator's decisions to ensure its decision-making is fair and unbiased. In addition, an administrative body consisting of Federal Court judges and other members with knowledge or experience in commerce, economics, law or public administration can re-hear or re-consider matters the competition regulator decided and affirm, set aside or vary the original decision. It also can review decisions regarding company mergers and acquisitions and terms and conditions of access to essential infrastructure facilities.

Australia's Financial Market Regulators, APRA and ASIC

In responding to the recommendations of a major review of the Australian financial system (the Wallis Inquiry, 1997) the Australian Government established two independent regulators, the Australian Prudential Regulation Authority (APRA) to prudentially regulate the financial system and Australian Securities and Investments Commission (ASIC), which replaced and expanded on the functions of the Australian Securities Commission, to oversee corporate governance and financial market regulation. Australia's central bank, the Reserve Bank of Australia previously undertook prudential regulation.

APRA, which is established under the *Australian Prudential Regulation Authority Act 1998,* is the prudential regulator of the Australian financial services industry. It oversees banks, credit unions, building societies, general insurance and reinsurance companies, life insurance, friendly societies and most members of the superannuation industry. APRA is funded largely by a levy on the industries it supervises. It currently supervises institutions holding approximately $2.5 trillion in assets for 20 million Australian depositors, policyholders and superannuation fund members. It establishes and enforces prudential standards and practices designed to ensure that financial promises made by supervised institutions are met within a stable, efficient and competitive financial

system. APRA also acts as the national statistical agency for the Australian financial sector and assists in preserving the integrity of Australia's retirement incomes policy (www.apra.gov.au).

The Australian Securities and Investments Commission (ASIC) which operates under the *Australian Securities and Investments Commission Act 2001,* is responsible for overseeing financial markets and corporate governance under the *Corporations Act 2000* and with APRA jointly supervises institutions under the *Retirement Savings Accounts Act 1997* and some more minor financial institution legislation. ASIC enforces and regulates company and financial services laws to protect consumers, investors and creditors. It regulates Australian companies, financial markets, financial services organisations and professionals who deal and advise in investments, including superannuation, insurance, deposit taking and credit. It protects consumers, investors and creditors of corporations, including an estimated 15.7 million people with a deposit account and 10.5 million people investing through superannuation or annuities. ASIC regulates 1.43 million companies, implementing Australia's corporate governance legislation, registering companies, investigating and acting against misconduct by company directors and officer and upholding laws on financial reporting and company mergers and acquisitions. It regulates 6,173 company auditors and 762 registered liquidators. It also regulates 12 licensed domestic financial markets and 5 clearing and settlement markets including the Australian Stock Exchange, investigating and acting against misconduct by listed companies and advising the Minister about rule changes and whether to approve new markets. As well it regulates about 4,500 financial services licensees, including stockbrokers, financial advisers, insurance brokers and fund managers, licensing them before they start operating, setting standards for education, training and operations and investigating and acting against misconduct (www.asic.gov.au).

APRA and ASIC are Commonwealth Government agencies, operating under the direction of independent executive groups appointed by the Governor-General on the nomination of the Treasurer. However, the ACCC retains all competition protection functions with regard to the financial institutions and corporations for which APRA and ASIC provide prudential and corporate governance regulation. Hence, if two financial institutions wish to merge, they must first obtain ACCC approval, and if they are involved in anti-competitive behaviour, the ACCC will investigate this conduct and if necessary pursue them in the courts. This avoids any confusion of role responsibility between the competition regulator, the ACCC, and sectoral regulators like ASIC and APRA. However, ASIC is responsible for consumer protection issues in financial markets.

The relationship between sectoral regulators and the competition regulator is discussed in more detail later in this paper and in the case study of the role of the telecommunications regulator and the ACCC (Attachment A.)

REMOVING POLICY IMPEDIMENTS TO COMPETITION - AUSTRALIA'S NATIONAL COMPETITION POLICY

Australia has addressed government imposed market failure and restrictions on competition by repealing or amending legislation that restricts competition, deregulating markets and restructuring or privatising former government owned monopolies. While competition policy legislation is effective in preventing anti-competitive behaviour by private firms, government legislation or regulation may still undermine or even prohibit competition in specific markets. Such restrictions may be due to historical government policies aimed at achieving economic or social policy objectives, such as preventing abuse of monopoly power by network infrastructure providers and providing infrastructure services to remote regions.

Some sector-specific impediments to competition include:

- legislation preventing private firms entering a market to compete with government owned utilities, marketing organisations, companies or social institutions, for example, government mandated monopolies for postal, electricity or telecommunications services
- preferential conditions, such as grants, cheap credit or tax free status that governments extend to public enterprises giving them an advantage over private businesses in the same market
- restrictions which prevent competitors gaining access to services from essential facilities needed to compete in a market, for example, electricity generators or retailers access to electricity transmission grids and or gas suppliers' access to gas pipelines
- legislated restrictions on international trade such as tariffs, anti-dumping provisions or quotas.

Australia's National Competition Policy, initiated in 1995, involves the national and sub-national governments agreeing to remove government imposed competition impediments primarily by reviewing and reforming legislation creating anti-competitive restrictions. In reviewing their anti-competitive legislation, jurisdictions undertake a cost benefit analysis of whether the restriction is in the best interests of the community as a whole and assess whether anti-competitive regulation is the only way to achieve the desired policy objective. Governments also are required to ensure public enterprises compete with private businesses on a 'level playing field' by removing all preferential treatment. Wherever possible they agreed to subject their government owned corporations to the same competition policy, company and tax legislation, environmental and planning approval processes and data and governance reporting systems as private businesses in the same market.

Australian governments also agreed to ensure new competitors can access key inputs or services accessed by incumbent monopoly firms. Implementing this policy requires governments to consider breaking up integrated government monopolies into competitive and monopoly elements and

providing third party access to the monopoly networks. For example, under National Competition Policy, all jurisdictions unbundled their electricity transmission lines from generators and retailers and gave competing generators and retailers equal access to these networks at a regulated price. Jurisdictions also agreed to ensure Government monopolies did not retain any regulatory role, as this could give them a competitive advantage over competing firms. As well, all firms are allowed to compete to provide community service obligations, Australia's term for subsidised services to disadvantaged groups.

Australia's National Competition Policy

In 1995, Australian Commonwealth and State governments agreed to introduce National Competition Policy. This followed the release of a major public inquiry, Hilmer, which found Australia's international competitiveness was slipping due to the uncompetitive nature of much of the economy. Major reforms included:

- Commonwealth and state governments reviewing all their legislation that restricted competition, a massive exercise of 1000s of pieces of legislation, and removing most restrictions
- governments agreeing to ensure competitive neutrality for government businesses, including by making them subject to the TPA, and requiring equality in tax and other treatment
- under the TPA, granting third parties the right to access monopoly infrastructure networks or assets of national significance
- introducing sectoral reforms in transport, electricity, gas and water where government monopolies were unbundled into separate companies holding competing and monopoly assets and in some cases privatised.

To share the fiscal benefits of reforms, the Commonwealth gave states and territories National Competition Policy payments of about $600-800 million per year for implementing the policy.

Benefits of Competition for Productivity

The 2005 Productivity Commission review of National Competition Policy found it had:

- directly permanently increased GDP by at least 2.5 per cent or $20 billion
- significantly lowered prices for major products including electricity, telecoms and milk
- stimulated innovation and consumer choice and promoted faster productivity growth.

It also found National Competition Policy gains were widespread with regional output growing in 56 of 57 Australian regions and the income of all income groups rising.

Source: Productivity Commission, 2005a

In 2006, following a review of National Competition Policy, COAG agreed to a successor policy, the National Reform Agenda. This included the Competition and Infrastructure Regulation Agreement, signed by all state premiers and chief ministers and the Prime Minister, which is focused on streamlining and strengthening national infrastructure regulation. This initiative responded to concerns raised in the Exports and Infrastructure Taskforce (Fisher) Report (2005) regarding multiple regulators operating across Australia in the same industries, resulting in a lack of consistency, overlapping regulation, potential conflict of interest of state regulators, especially where government owned assets are competing in the market. The Competition and Infrastructure Regulation Agreement reinforces roles for state regulators, through a significant reliance on the Part IIIA certification mechanism to achieve consistency of export-related infrastructure regulation. The Australian Government noted that it considered a single national regulator would be preferable and reserved the right to legislate to that effect if the new arrangements are not effective.

The National Reform Agenda also agreed to strengthen capacity to plan the national electricity market and to establish a single National Energy Market Operator. As discussed below, electricity and gas regulation will eventually become the sole responsibility of the Australian Energy Regulator. The National Reform Agenda also sought to address some of the problems associated with decentralised regulation in the rail industry.

The National Competition Council

The National Competition Council was established by all Australian governments in November 1995 to act as a policy advisory body to oversee the implementation of National Competition Policy. The Council does not set reform agendas or implement reforms; these are the responsibility of the various governments. Although the Council is funded by the Commonwealth Government, it is accountable to all Australian States and Territories through the Council of Australian Governments (CoAG). As a statutory body, the Council is independent of the executive (political) arm of governments.

The National Competition Council comprises four part time councillors with a variety of backgrounds who are drawn from different parts of Australia. It is supported by a secretariat of approximately 10 staff located in Melbourne. The Secretariat provides advice and analysis at the Council's direction on matters related to the implementation of the NCP. It represents the Council in dealings with Commonwealth, State and Territory government officials and other parties with interests in competition policy matters (www.ncp.gov.au).

The National Competition Council has four main roles:

1. assessment of governments' progress in implementing the NCP reforms

2. advice on the design and coverage of access rules under the national access regime

3. community education and communication covering both specific reform implementation matters and NCP generally

4. other specific projects requested by Australian governments.

Goals of the Council

NCP seeks to deliver benefits to the Australian community. In that context, the Council strives to achieve the following goals:

- to facilitate timely implementation of effective and fair competition reforms by governments
- to promote competition policy as an 'economic tool' for enhancing Australia's performance and productivity
- to promote better use of Australia's infrastructure
- to build community awareness and support of National Competition Policy.

Under the National Reform Agenda, responsibility for monitoring progress will move to a new body, the COAG reform Council. However, responsibilities regarding the national access regime under Part IIIA of the *Trade Practices Act* will remain with the National Competition Council.

National Competition Policy Payments

Under National Competition Policy, the Australian Government made National Competition Policy payments to the states and territories on a per capita of population basis, where they achieved satisfactory progress against the NCP and related reform obligations. These payments will cease at the end of June 2006, after ten years of payments. National Competition Policy payments were the means by which gains from reform were distributed to the states and territories. The payments recognised that, although the states and territories were responsible for significant elements of National Competition Policy, much of the direct financial return accrued to the Australian Government via increases in taxation revenue that flowed from greater economic activity.

The National Competition Council advised the Australian Treasurer on whether the states and territories had achieved satisfactory progress and so met the conditions for receiving payments. This was reported in the NCP assessment reports. In 2005-06, the Council recommended payments of A$834 million, which the Commonwealth Government paid to the Australian States and Territories for completing National Competition Policy reforms.

Under the NRA, the new COAG Reform Council will determine, after reforms are completed, whether a fair sharing of the costs and benefits of National Reform Agenda reforms warrant payments from the Commonwealth to state and territory governments.

RELATIONSHIP BETWEEN COMPETITION AND SECTORAL REGULATORS

Australia has undergone significant debate regarding the most appropriate framework for administering economic, technical and competition regulation. The issues debated include the merits of general versus industry specific competition regulators and of integrated versus separate administration of economic, technical and competition regulation. This section outlines in more detail Australia's approach to this debate and its attempts to improve the interaction between its competition and regulatory authorities.

As outlined above, Australia's general competition law, the *Trade Practices Act* applies across all industries and is administered by a single competition authority, the Australian Competition and Consumer Commission, the ACCC. While the ACCC is responsible for enforcing the Trade Practices Act, individuals and companies may commence their own legal proceedings and seek damages and other remedies against parties that allegedly breach the Act. In addition to its core competition function, the ACCC has a number of key economic regulatory functions.

Under the general or economy wide access regime for essential infrastructure facilities established in Part IIIA of the *Trade Practices Act*, the National Competition Council advises the Government regarding rights of access and, where these are established, the ACCC acts as an `arbitrator of last resort'. That is, the ACCC has the power to arbitrate access disputes and determine the final terms of access, including access prices, if access seekers and owners of essential facilities fail to reach a commercially negotiated settlement. As noted above, the Australian Competition Tribunal is an appellate body able to review certain adjudication decisions made by the ACCC including those related to access disputes. The ACCC and the National Competition Council also perform several important economic regulatory functions. For example, the ACCC has various responsibilities in relation to the terms and conditions of access to certain essential infrastructure facilities such as telecommunications, gas and electricity and in monitoring prices in industries where competition is weak. It also has a quality of service and price monitoring role in respect of airports. This general approach promotes consistency, certainty and fairness in the universal application of the competition law. It also enhances the regulator's ability to take an economy-wide perspective, reduces the risk of regulatory `capture' by industry, minimises duplication and provides administrative savings. These responsibilities reflect the Government's view that placing these economic regulatory functions with the general competition agency has significant advantages in reducing implementation confusion.

In the case of the National Competition Council, the main regulatory function is in relation to establishing rights of access to the services of certain essential infrastructure facilities. Other significant aspects of economic regulation, such as the granting of licences are typically administered by industry specific regulators or by more general government regulators. Technical regulatory issues that do not have a significant competition element are typically administered by industry specific regulators or may be subject to goods and services standards set by Australia's principal standards organisation, Standards Australia.

Industry Specific Regulation

Advantages can exist in having industry-specific competition regulation in industries characterised by complex technology, natural monopoly or other special elements. In the case of telecommunications, specific competition laws are contained in Part XIB of the Trade Practices Act, which is administered by the ACCC and which complements rather than replaces general competition law. The regulation of telecommunications in Australia is covered in detail as a case study in Attachment A of this paper.

Industry specific competition provisions are also contained in Part X of the Trade Practices Act, which provides a regime for regulating the conduct of those international liner cargo shipping companies which collaborate as conferences under agreements registered with the Australian Department of Transport and Regional Services, which has responsibility for maritime policy. Part X provides special, but conditional, exemption for exporters from the competitive conduct provisions of the Trade Practices Act without the need for authorisation by the ACCC. Failure on the part of conferences to meet Part X conditions and provide efficient and economical services can result in an investigation by the ACCC and a recommendation to the Minister for Transport and Regional Services. The Productivity Commission reviewed Part X of the TPA in 2006 and recommended abolishing the shipping conferences' exemption from the provisions of the TPA. However, the Government accepted a fallback recommendation by the Productivity Commission to more strictly limit the scope of the exemption by only registering agreements between shipping lines that do not discuss prices or limit services (Productivity Commission, 2005b).

Integrated versus separate administration of economic, technical and competition regulation

Technical regulation and some significant aspects of economic regulation are administered in Australia by industry specific bodies or more general government regulators. This recognises that the national competition authority should focus on anti-competitive conduct and not become embroiled in overly detailed or complex regulatory matters unless they have a clear connection with competition issues in, for example, network industries.

Separation of regulatory duties between competition, technical and economic regulators does entail the risk that competition regulators will not always have the same level of technical knowledge that can be achieved by an integrated industry regulator. This has not been a serious problem to date in Australia and the risks are less in industries where the ACCC has both an economic regulatory role as well as its normal competition role. In addition, various mechanisms are in place to improve co-ordination between regulators as discussed below.

In the energy sector, the Australian Energy Regulator, the economic regulator of the electricity and gas industry, was established as a separate legal entity but also is a constituent part of the ACCC under the *Trade Practices Act 1974*. It eventually will take over all the energy regulatory roles of the state based economic regulators. The relevant part of the *Trade Practices Act* provides that one of the Australian Energy Regulator's three members, who are statutory appointments, must be a commissioner of the ACCC. The ACCC and National Competition Council are given responsibility for competition and access issues relating to the energy sector, while the Australian Energy Regulator is responsible for technical regulation of the energy industry. In the gas industry the Australian Energy Regulator's role includes monitoring compliance with ring fencing obligations and approving access arrangements, covering services, reference tariffs, trading and expansions, in accordance with an industry code.

There is a strong emphasis in all these areas on the desirability of commercially negotiated outcomes. Generally speaking the regimes establish frameworks within which industry participants operate commercially and the role of the regulator is as light-handed as possible.

State regulators

Economic regulation of State based markets mainly occurs at the State government level. Most states now regulate markets by general regulators such as the New South Wales Independent Pricing and Regulatory Tribunal, the Victorian Essential Services Commission, the Queensland Competition Authority and the South Australian Independent Pricing and Access Regulator. These bodies have responsibilities, including technical ones, across a range of industries and, as discussed below, have a close association with the ACCC.

Addressing regulatory uncertainty

With the `division of labour' between various regulators, potential exists for some overlap of functions between the ACCC, which administers competition regulation across all sectors of the economy, and those technical and economic regulators that operate within specific industries or within certain States across a number of industries. For this reason, governments have taken steps to

minimise uncertainty regarding the jurisdiction of particular regulators and to avoid confusion for consumers and the business community.

For example, the ACCC has frequent information exchanges with a variety of economic and technical regulators through regular liaison meetings, particularly the Utility Regulators Forum, and the exchange of publications and other information. The Utility Regulators Forum aims to focus understanding of similar issues and concepts faced by different regulators, minimise regulatory overlap for large users operating across jurisdictions, provide a means of exchanging information, and enhance the prospects for consistency in the application of regulatory functions (www.accc.gov.au/content/index.phtml/itemId/3894). In conjunction with a number of Commonwealth and State regulatory agencies and policy advisers, the ACCC publishes the quarterly Forum's *Network* newsletter to discuss common regulatory issues and facilitate cooperation (www.accc.gov.au/content/index.phtml/itemId/401648/ fromItemId/3894).

The ACCC also has a significant public and business education role. In addition, chairpersons of various Commonwealth and State economic regulators such as the Australian Communications and Media Authority (ACMA), the New South Wales Independent Pricing and Regulatory Tribunal and the Victorian Essential Services Commission are associate members of the ACCC and certain members of the ACCC are appointed as associate members of the ACMA. This helps to bridge the `knowledge gap' that can arise when competition, economic and technical regulators are separate bodies.

CONCLUSION

Australia has generally adopted a mandated division of labour approach to regulation with a general competition law administered by a single independent statutory body, the ACCC, promoting consistent application of competition regulation across all sectors of the Australian economy. However, governments have recognised the desirability of the ACCC having `economic regulatory' roles in some industry sectors, in particular, essential infrastructure and network industries. Industry specific competition regulation has been employed sparingly, currently telecommunications and conference shipping.

In the longer term, as competition increases in industries previously exempt from the *Trade Practices Act* or otherwise suffering from legislative barriers to competition, and convergence between industries such as information technology and telecommunications continues, Australia expects to place greater reliance on general competition laws rather than industry specific regulation. This means the ACCC will need to continue developing its in-house expertise regarding technical

aspects of regulated industries and continue consulting frequently with industry-specific regulators to facilitate the smooth operation of competition, economic and technical regulation.

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COMMUNICATIONS CASE STUDY **Attachment A**

In 1997, the Australian Government introduced a reform package to facilitate full and open competition in Australia's telecommunications industry. These reforms substantially increased the ACCC's regulatory role in the telecommunications sector. Prior to 1992 Telstra, formerly Telecom, was the wholly Government owned monopoly provider of telecommunications services. Telecom also performed the role of regulator prior to this function being transferred in 1989 to an independent industry regulator, Austel. In 1991 the Government decided to issue a second carrier licence, to create a managed duopoly and to expand Austel's role to include telecommunications industry competition matters. During this time the ACCC's role was for the most part limited to consumer protection issues. Optus acquired the second carrier licence and began providing services in competition with Telstra in 1992. Soon afterwards a legislated triopoly in mobile telephony was formed with Vodafone commencing services in 1993. Limited opportunities for resale of Telstra's services were also allowed from 1991.

With the introduction of full and open telecommunications competition in Australia in 1997, telecommunications was brought within the reach of the general anti-competitive provisions of the Trade Practices Act. Because of uncertainty, however, as to whether these general provisions would deal effectively with the complexity and limited level of competition in some telecommunications markets, it was also decided that additional industry specific provisions should be introduced into the Trade Practices Act to regulate anti-competitive conduct in the industry. The industry specific provisions in Part XIB of the Trade Practices Act give the ACCC powers to issue competition notices to carriers and service providers engaging in anti-competitive conduct. These notices are enforced through the courts and if carriers are found to have contravened the provisions, they face significant pecuniary penalties and restitution orders.

The ACCC is also responsible for administering an industry-specific access regime for telecommunications under Part XIC of the Trade Practices Act. The aim of this regime is to provide for the long term interests of end users of telecommunication services through ensuring full service provider connectivity to the network, maximising positive network externalities, promoting diversity and competition in the supply of carriage, content and other services and promoting the efficient use of, and investment in, network infrastructure. The telecommunications access regime provides a framework for regulated access rights to be established for specific carriage services and related services and establishes mechanisms within which the terms and conditions of access to the network service can be determined.

The Trade Practices Act provides extensive information gathering powers and the ACCC is able to make record keeping rules for specified industry participants to assist it in the administration of the telecommunications specific provisions. It is intended that these industry specific anti-competitive provisions will eventually be aligned to the fullest extent practicable with the general trade practices law. Finally, it should be noted that the ACCC is responsible for administering price cap arrangements applying to Telstra.

Technical regulation for telecommunications, such as spectrum management, was transferred from Austel first to a telecommunications authority and then in July 2005 to a merged new independent regulator known as the Australian Communications and Media Authority (ACMA). The ACMA also administers economic regulation in respect of licensing, carrier and service provider rules, numbering and universal service arrangements.

Reasons for regulatory changes in telecommunications

As noted above, the Government considered the special nature of the telecommunications industry warranted adoption of non-generic competition regulation for a transitional period. As competition in the telecommunications sector increases over time, there is an expectation the need for special provisions will decline and reliance on the general competition law will be more likely to suffice. To assist this movement towards reliance on general competition law, it was decided to have the industry specific competition provisions administered by the ACCC under the Trade Practices Act and to leave technical and licensing issues to the industry regulator, the ACMA. It should be emphasised that the industry specific competition provisions are broadly consistent with the general provisions of the Trade Practices Act and complement rather than replace the general law.

The ACCC's role in telecommunications brings an economy wide perspective to competition regulation in a sector experiencing rapid integration or convergence with other industries such as information technology, financial services, broadcasting and, more recently, participants in the energy reticulation markets. This convergence has seen new service forms develop and existing forms are merging to create new hybrid services. Hence, it is increasingly difficult to categorise services in traditional terms which may involve a simple linkage between a particular service and a particular technology used to deliver that service. Clearly, the convergence phenomenon has implications for the roles of different regulators and increases the arguments for general rather than industry specific regulation,

Interaction between the ACMA and ACCC

Some telecommunications issues involve areas of overlap between the ACMA and the ACCC. In general, where one agency has responsibility for a particular issue that may overlap with the other

agency, the relevant legislation requires consultation and notification. For instance, while the ACMA is generally responsible for specifying technical standards where such standards are integral to competition within the market the ACCC may assume primary responsibility for their issue. Moreover, given the telecommunications access regime is inextricably linked to technical matters within the industry, the ACCC must consult the ACMA on matters such as the model terms and conditions to apply to telecommunications services subject to an access regime.

The chairperson of the ACMA is currently an associate member of the ACCC, which enables the ACCC to call on relevant technical expertise when dealing with complex competition issues in the telecommunications industry. Further, as already mentioned, a member of the ACCC is an associate member of the ACMA, which further reduces the possibility that conflicts or overlaps will exist or develop to any significant degree.

Personnel changes in the ACCC

When the telecommunications regime commenced in 1997, a number of Austel's experienced personnel were moved to the ACCC, along with its competition functions, so that the ACCC would have sufficient technical expertise to deal with the specifics of the telecommunications industry. In addition, the ACCC has appointed a full time member of the Commission to be responsible for telecommunications issues.

Experience of the last decade

Reform of the telecommunications market in 1997 saw a number of new carriers commencing operations to offer competing services. Two aspects of the regulatory regime have contributed to their success. First, the ACCC has additional powers to intervene if necessary in the marketplace and respond to anti-competitive conduct. Secondly, the legislated access regime provides the ACCC with discretion, after public consultation, to declare network services that it considers should be made available to all market participants. A number of basic network services essential for competition were declared from 1997, including originating and terminating access for fixed and wireless services, certain trunk transmission services, digital data access and a conditioned local loop service. As competition has become more established, most notably in the mobile telephony market, the ACCC has revoked some of these declarations.

As noted above the new regulatory regime saw the entry of a number of new carriers. Consumers have benefited from price reductions and service enhancements and Telstra's market shares in international, domestic long distance and mobile telephony have declined. The access regime has also been a key driver of competition in the broadband market as mandated access to Telstra’s copper access network has led to significant investment by Telstra’s competitors in Asymmetric

Digital Subscriber Line (ADSL) and ADSL2+ infrastructure. Furthermore, the development of 3G wireless networks, including Telstra's 'Next G' network was recently recognised by the ACCC as an emerging source of competition (ACCC, 2006).

Notwithstanding these successes, Telstra remains dominant in many markets and controls significant 'bottleneck' infrastructure, including its copper access and cable networks. Telstra has also become increasingly vocal in its campaign against the telecommunications access regime. Most notably, in August 2006, Telstra put on hold a planned fibre-optic network investment, claiming that the ACCC's approach to access regulation did not sufficiently recognise the costs it incurs in providing telecommunications services to regional and rural Australia. The Government has since announced that it will establish a competitive bidding process to expedite the commercial roll-out of a fibre network in Australia.

Although the Australian Government has primarily focussed on fostering competition as a means to ensure the long term interests of telecommunications users are met, a number of targetted funding measures have also been introduced to address cases of market failure, particularly in rural and regional areas. For example, in June 2007, the Government announced that 99 per cent of the population will be covered by broadband services of at least 12 megabits per second. Funding programmes such as 'Broadband Connect' are expected to ensure continued parity between metropolitan and non-metropolitan areas by extending broadband into areas which have not traditionally had access to these services.

Reflecting this situation, new industry entrants have urged some additional regulatory initiatives to further assist developing competition. Since the 1997 reforms, the issues most commonly raised are the need for improved cost information disclosure requirements by the incumbent, to assist access seekers in the access negotiation process, and the need for an improved regulatory scrutiny of the incumbent's internal cost allocation. The question of whether these proposals should be accepted will require the Government to balance the claims of new entrants for additional regulatory assistance with the need to ensure that Telstra is not unreasonably constrained in responding to its competitors. The benefits to consumers from the new regime come as much from the actions of Telstra in responding to competition as from the initiatives of the new entrants themselves.