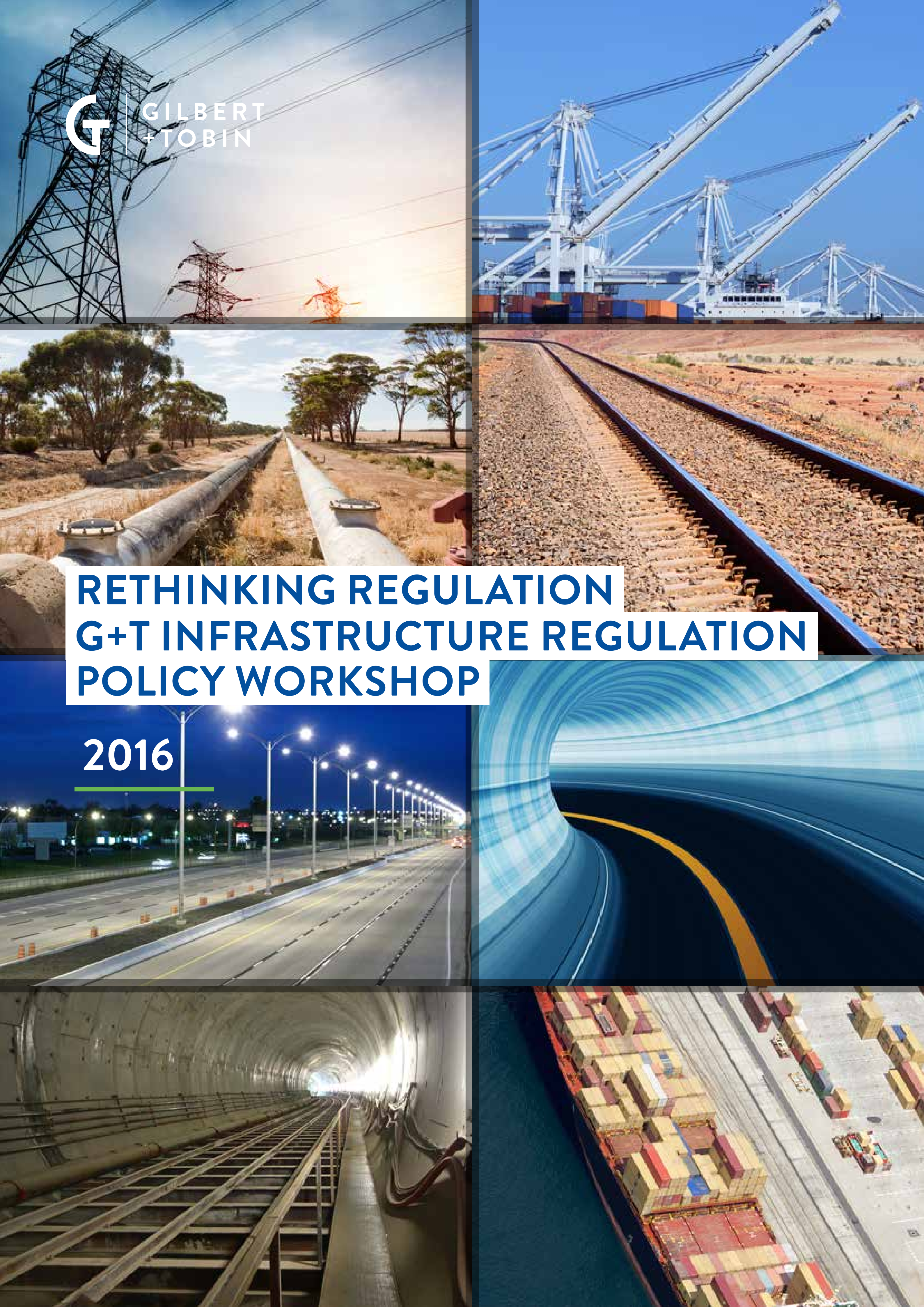

GILBERT + TOBIN

RETHINKING REGULATION G+T INFRASTRUCTURE REGULATION POLICY WORKSHOP

2016

RETHINKING REGULATION: 2016 G+T INFRASTRUCTURE REGULATION POLICY WORKSHOP

2016 HAS BEEN ANOTHER BUSY YEAR FOR INFRASTRUCTURE REGULATION, WITH A RAFT OF REVIEWS, INQUIRIES AND IMPORTANT DECISIONS. THIS NOTE IDENTIFIES FOUR OF THE MAJOR TRENDS THAT HAVE EITHER EMERGED OR ACCELERATED DURING THE YEAR, ALL OF WHICH HAVE THE POTENTIAL TO SIGNIFICANTLY IMPACT NETWORK OWNERS, USERS, INVESTORS AND REGULATORS.

Infrastructure regulation and policy has been viewed by many as dull and lifeless. However, 2016 may be the year that dispels that myth, demonstrating that infrastructure regulation can be both dynamic and unpredictable – often with serious financial implications.

The history of access regulation in Australia stems from the work of the Hilmer Committee in 1993.[1] In 2016, almost 25 years on from that ground breaking report, the world is a different place. The liberalisation process has largely been successful and has unleashed a significant degree of competition across infrastructure supply chains. Government ownership has become the exception, rather than the rule. Market forces have also changed, with some markets experiencing fundamental and disruptive changes in technology and demand for the first time in decades.

These changes are gathering pace and putting pressure on traditional access and pricing frameworks.

1 Professor Frederick Hilmer (Chair), Mark Rayner and Geoff Taperell, National Competition Policy – Report by the Independent Committee of Inquiry (25 August 1993).

KEY MESSAGES

In this note, we identify four regulatory themes which have emerged or accelerated during 2016 and which have the potential to reshape the regulatory landscape:

1

Deregulation appears to be dead, or dying. An attempt by the ACCC to reframe what is meant by 'light touch' regulation seems intended to lead to a wider regulatory footprint – with implications for privatisation values and the cost of capital in infrastructure markets.

+ In a number of public statements in respect of the port and gas sectors, the ACCC has tried to reframe the definition of 'light touch' regulation to be the negotiate/arbitrate model, with price monitoring no longer considered to be regulation at all.
+ In 2016, there were a number of examples of the expansion of regulation in network sectors, including the ACCC proposing the regulation, or re-regulation, of almost all major Australian gas pipelines. The Australian Energy Regulator (AER's) development of ring-fencing in the electricity sector sought to exclude networks from emerging energy markets, while the ACCC has declared or commenced new declaration inquiries in telecommunications, including in areas where current regulatory settings have attracted billions of dollars in network investment, such as mobile networks. Recent comments made by ACCC Chairman Rod Sims indicate that the ACCC considers that many Australian ports – currently subject to price monitoring regimes – should, at a minimum, become subject to a negotiate/arbitrate model.

2

The ACCC appears to be increasingly using behavioural and asset value measures to 'test' whether regulation is required, rather than the traditional economic cost/market structure analysis.

+ During 2016, the debate about whether declaration under Part IIIA should be available to address monopoly pricing reached a head with the decision of the Australian Competition Tribunal in *Glencore*.[2] While that decision is still on appeal, subsequent exposure draft legislation suggests that debates about the declaration criteria may be put to bed by amendments during the course of 2017 – effectively reversing the position taken by the Tribunal (although the exposure draft legislation is not entirely clear).
+ At least three times during 2016, the ACCC has sought to point to 'evidence' of asset or transaction/project values (or earnings multiples) to support a finding of monopoly power in infrastructure markets, including in:
  - repeated comments about the Port of Newcastle and Glencore case;
  - submissions made to the Australian Competition Tribunal in relation to authorisation of the acquisition by Sea Swift of the assets of Toll Marine Services; and
  - its approach to arguing for regulation of pipelines following the East Coast Gas Inquiry.

  A looming and important regulatory debate is the extent to which valuations of this kind in relation to infrastructure can be understood as providing evidence of 'capitalised' market power.

3

Following trends globally, Australia is exploring innovative 'consumer centric' regulatory models for utility sectors, which could allow for a more flexible approach to rates of return in exchange for innovation in customer service and network delivery.

+ During 2016, the Essential Services Commission (ESC) in Victoria undertook interesting work on a new incentive-based model for tariff regulation, based on a model developed for the energy and water sectors in the United Kingdom.
+ This innovative model – which may catch on in other states – requires networks to base their regulatory and network objectives on direct consumer engagement, but allows them to seek a faster regulatory approval and potentially increased rate of return for over-performance..

4

The debate about institutional reform looks likely to go stale. However, even if a single access and pricing regulator is off the table, the debates about institutions are important, especially regarding merits review.

+ The Australian Government's response to the Harper Review suggests that major institutional reform across sectors is unlikely. At the same time, other important institutional structures, such as limited merits review in electricity and gas, are under serious threat and could disappear during 2017.

2 Application by Glencore Coal Pty Ltd [2016] ACompT 6.

DEREGULATION IS DEAD OR DYING – AND THE RE-EMERGENCE OF HEAVY HANDED REGULATION IS LIKELY TO IMPACT ON PRIVATISATION VALUES AND THE COST OF CAPITAL IN INFRASTRUCTURE MARKETS

Australian regulators appear keen to regulate more, not less

Despite the global trend to remove regulatory impediments, which is seen from the OECD's product market regulation index over time,[3] a number of regulatory decisions during 2016 highlight a trend in Australia towards extending regulation.

Examples from 2016 include:

+ **Gas** – In July, the ACCC in its East Coast Gas Inquiry Report[4] advocated a new 'market power' based test to assess coverage of gas pipelines. If implemented, this would mean the re-regulation or regulation for the first time of most, if not all, major Australian pipelines.
+ **Telecommunications** – The ACCC recently declared a superfast broadband service,[5] it appears likely to re declare a wholesale ADSL service,[6] and it is also currently running a declaration inquiry into wholesale mobile roaming services.[7] All of this is in addition to the ACCC's wider sectoral market study of communications.
+ **Electricity** – The AER is currently conducting a consultation process[8] on draft ring-fencing guidelines for electricity distribution networks which, if put into place, would impose these, networks stringent restrictions on those networks' involvement in new and dynamic markets. At the same time, there is a review by the COAG Energy Council into the future of the limited merits review framework[9] in electricity, with the real threat that this form of oversight will be wound back, or removed altogether.

It seems that, everywhere you look, regulation is on the march.

The ACCC has sought to reframe what constitutes 'light touch' regulation – starting with ports and gas pipelines

At (last year's) 2015 G+T Infrastructure Workshop, ACCC Chairman Rod Sims was strongly critical of the price monitoring regimes that have been put in place across the port sector.[10] In that speech, he sought to reframe what has traditionally been seen as a 'light touch' regulatory mechanism - price monitoring or oversight. He said:

> **"I WOULD LIKE TO SUGGEST THAT THE CURRENT INTERPRETATION OF LIGHT-HANDED REGULATION OF MONOPOLY INFRASTRUCTURE, WHICH IN ESSENCE HAS COME TO MEAN PRICE MONITORING, IS NOT ONLY ILL-CONCEIVED IN ECONOMIC THEORY, IT HAS FAILED IN PRACTICE … EXPERIENCE HAS SHOWN THAT, IN CIRCUMSTANCES OF NATURAL OR LEGISLATED MONOPOLY, PRICE MONITORING WILL HAVE LITTLE OR NO LONGER TERM IMPACT ON THE CONDUCT OF THE MONOPOLY INFRASTRUCTURE OWNER."**

This concern had earlier been expressed in the ACCC's submission into the Victorian Government's consultation process on the legislative framework for the privatised Port of Melbourne.[11] Following that process, the Victorian Government put in place a strong price regulation framework (including CPI caps on price increases for the first 15 years, followed by the potential for direct price regulation), which was acknowledged by the ACCC when considering the acceptability of the two bidding consortia.[12]

In a speech by Sims at the Ports Australia Conference on 20 October 2016, the Chairman again labelled price monitoring as ineffective.[13] In his speech, Sims made clear that ports exhibit natural monopoly characteristics with no effective constraint on pricing, and therefore *"[i]t is the ACCC's view that a negotiate-arbitrate framework is the minimum for effective regulation [of port] … infrastructure."*[14]

Having sought to shift the regulatory dial by redefining 'light touch' regulation as a negotiate/arbitrate model, the ACCC then used this to take some of the heat out of its proposal to significantly extend the regulation of gas pipelines. In its final report following the East Coast Gas Inquiry, the ACCC proposed an alternative model for determining coverage of gas pipelines – that would result in most, if not all, major Australian gas pipelines becoming subject to the negotiate/arbitrate framework under the National Gas Law.

3 See OECD, "Indicators of Product Market Regulation" (2013) <http://www.oecd.org/eco/growth/indicatorsofproductmarketregulationhomepage.htm#indicators>. In particular, the index for network regulation shows that the OECD trend (and the trend in Australia up until 2013) has been to remove regulation. See, also, Isabelle Koske, Isabelle Wanner, Rosamaria Bitetti, Omar Barbiero, The 2013 update of the OECD's database on product market regulation: Policy insights for OECD and non-OECD countries (2015) p 3.
4 ACCC, Inquiry into the east coast gas market (April 2016).
5 ACCC, "Superfast broadband networks opened up to competition through ACCC declaration" (29 July 2016) <https://www.accc.gov.au/media-release/superfast-broadband-networks-opened-up-to-competition-through-accc-declaration>.
6 ACCC, "ACCC commences inquiry into regulation of wholesale ADSL service" (4 July 2016) <https://www.accc.gov.au/media-release/accc-commences-inquiry-into-regulation-of-wholesale-adsl-service>.
7 ACCC, "ACCC to consider declaration of mobile roaming" (5 September 2016) <https://www.accc.gov.au/media-release/accc-to-consider-declaration-of-mobile-roaming>.
8 See Australian Energy Regulator, Draft Ring-Fencing Guideline and Draft Ring-Fencing Explanatory Statement (August 2016) <https://www.aer.gov.au/networks-pipelines/guidelines-schemes-models-reviews/electricity-ring-fencing-guideline-2016>.
9 See COAG Energy Council of Australia, Review of the Limited Merits Review Regime: Consultation Paper (6 September 2016).
10 ACCC, "ACCC believes price monitoring for monopoly infrastructure will damage Australia's economy" (29 October 2015) <https://www.accc.gov.au/media-release/accc-believes-price-monitoring-for-monopoly-infrastructure-will-damage-australia%E2%80%99s-economy>.
11 See ACCC, ACCC submission to the inquiry into the proposed lease of the Port of Melbourne (September 2015) p 7.
12 ACCC, "ACCC will not oppose proposals for Port of Melbourne lease" (11 August 2016) <https://www.accc.gov.au/media-release/accc-will-not-oppose-proposals-for-port-of-melbourne-lease>.
13 Rod Sims, "Ports: What measure of regulation", Address at Ports Australia Conference (20 October 2016) <http://www.accc.gov.au/speech/ports-what-measure-of-regulation>.
14 Ibid.

This reframing is important. While negotiate/arbitrate models are less 'direct' than formal price regulation, they are ultimately no less coercive for the owner of infrastructure. Increasing the use of the negotiate/arbitrate model would, ultimately, still lead to arbitrated price outcomes that adopt – it might be assumed – relatively traditional, cost-based pricing models. There is an active debate about what this kind of regulatory pricing would mean for continued network investment.[15] Arbitration processes can also be time consuming and costly. Indeed, in the telecommunications sector in a different era, the negotiate/arbitrate model was criticised by the ACCC as being ineffective and unwieldy and was ultimately replaced in 2010.[16]

Ring fencing in the electricity sector – a heavy handed solution, looking for a problem

The energy market is facing exciting, but highly disruptive, changes over coming years. The likely growth of distributed generation (roof top solar), storage (batteries) and increasing demand-side management through smart meters, is likely to significantly change the operation and design of the grid. Most of these new markets (batteries, solar and metering) are contestable, or are becoming so.

The question facing the industry and the AER has been the extent to which distribution networks should be able to participate in these markets.

The AER has responded to this dynamic environment by attempting to prevent any involvement by distribution network owners in emerging markets, citing concerns over vertical integration and potential discrimination. The heavy-handedness of this response was apparent in the AER's preliminary position paper that, in addressing the balancing of costs and benefits of the new regime, stated:[17]

> *We acknowledge that ring-fencing obligations will impose costs on the providers of ring-fenced services. There may be concern from stakeholders, particularly from NSPs, about the potential cost of complying with the ring-fencing approach as proposed. In particular, that the approach would introduce new administrative requirements associated with ring-fencing compliance and consequently costs that are ultimately borne by consumers.*
>
> *An NSP would be able to reduce the costs it incurs for ring-fencing compliance by not engaging in activities that are subject to ring-fencing obligations that is, by leaving the provision of the service to other parties. We anticipate compliance costs would not be significant unless an NSP was engaged in the provision of services that are subject to ring-fencing.*

It appeared clear that the primary function of the ring fencing guidelines was not to manage a potential risk of discrimination arising from vertical integration, but to simply prevent network owners from playing at all.

In doing so, the AER's positions paper did not consider market dynamics, the countervailing power of other competitors in these emerging markets, often with their own regulatory advantages (such as large retailers), or the important value which networks could offer in assisting innovation. The positions paper simply assumed that competition and innovation would be better promoted without their involvement. In fact, the AER stated explicitly that its preferred approach "*assumes ring-fencing is beneficial to consumers*."[18]

The draft ring fencing guidelines that followed the positions paper did not allow for any regulatory flexibility for most provisions and did not provide any meaningful transitional period. This is despite the implementation of ring-fencing arrangements in other sectors, such as telecommunications having, proved to be extremely complex, costly and time-consuming.[19]

Merits review, mobile roaming, and biting the hand that invests?

Similar risks of re-regulation are emerging across other network industries. In telecommunications, the ACCC has commenced an inquiry into wholesale mobile roaming[20] and is also planning to continue the regulation of wholesale ADSL despite the rollout of the NBN.[21] In particualr, it is surprising that the ACCC has commenced a declaration inquiry into mobile roaming prior to completing its current sectoral review of communications markets, or at all, in a context where there has been substantial competition and significant, highly-publicised investments by the three major mobile network operators over recent years (Telstra will invest $5 billion in the three years to June 2017, while Optus has an annual mobile network investment of over $1.5 billion).[22]

Increasing regulatory risk is also emerging in the energy market, with calls for the removal of 'merits review' from AER revenue determinations.[23] This would weaken accountability in the sector, and would leave the AER subject only to judicial review processes. Capital markets are already warning about the potential risk that removal of appropriate oversight may have on the debt raising costs of networks.[24]

All of this highlights a trend towards greater – and indeed more heavier-handed – regulation of network industries, which seems likely to have flow-on implications for investment.

15 See APA, "APA notes the release of ACCC's East Coast gas report" (22 April 2016) < https://www.apa.com.au/news/asx-releases/2016/apa-notes-release-of-accc-report-22-may/> - "to increase regulation of pipelines will stymie further investment and innovation".

16 Telecommunications Legislation Amendment (Competition and Consumer Safeguards) Act 2010.

17 AER, Electricity Ring-Fencing Guideline: Preliminary Positions (April 2016) p 31.

18 Ibid p 20.

19 For example, the cost of implementing functional separation of British Telecom in the United Kingdom in 2005-208 was reported to be GBP 153 million, while the cost of functional separation of Telecom NZ in New Zealand has been estimated at $NZ200 million.

20 ACCC, "ACCC to consider declaration of mobile roaming" (5 September 2016) <https://www.accc.gov.au/media-release/accc-to-consider-declaration-of-mobile-roaming>.

21 ACCC, "ACCC commences inquiry into regulation of wholesale ADSL service" (4 July 2016) <https://www.accc.gov.au/media-release/accc-commences-inquiry-into-regulation-of-wholesale-adsl-service>.

22 See "Optus to raise infrastructure spending to $1.77 billion as network competition heats up", Australian Financial Review (14 March 2015) <http://www.afr.com/business/telecommunications/optus-to-raises-infrastructure-spending-to-177-billion-as-network-competition-heats-up-20150513-gh17x6>. See also "Telstra to spend $5 billion in mobile war with Optus", Sydney Morning Herald (9 July 2015) <http://www.smh.com.au/business/telstra-to-spend-5-billion-in-mobile-war-with-optus-20150706-gi5uq7.html>.

23 See COAG Energy Council, Review of Limited Merits Review Regime: Consultation Paper (6 September 2016).

24 "Energy sectors debt cost will soar, banks warn", The Australian (16 October 2016) <http://www.theaustralian.com.au/business/energy-sectors-debt-cost-will-soar-banks-warn/news-story/40f5eeff63b222d2e49548a72d5ab975>.

THE ACCC IS LOOKING TO TESTS BASED ON BEHAVIOUR AND ASSET VALUES TO SUPPORT A FINDING OF 'MONOPOLY POWER' AND TO JUSTIFY REGULATORY INTERVENTION

Despite the decision in Glencore, the approach to criterion(a) looks unlikely to change.

We have previously written about the important debate which has emerged over whether Part IIIA should address monopoly pricing concerns, or should be limited to issues of vertical integration and discrimination (available here) – which was an issue that came to a head during 2016 with two important developments:

+ the decision by the Australian Competition Tribunal to declare a shipping channel service at the Port of Newcastle – overturning the earlier recommendation of the NCC and decision of the Minister to not declare the service; and
+ exposure draft legislation released in response to the Harper Review and Productivity Commission review, which includes proposed amendments to criteria (a), (b) and (f).

The exposure draft legislation adopts the Productivity Commission's recommendations that criterion (a) be explicitly changed to a 'with and without declaration test'.[25] This can be contrasted with the Australian Competition Tribunal's view in Glencore which was that the 'with and without access' test was the relevant test that it should apply based on the precedent of the Full Federal Court in the Sydney Airport decision.[26]

So what does this mean? The 'with and without declaration, test' established in the exposure draft legislation would return the position to the higher threshold applied by the NCC prior to Glencore, which also requires an assessment of the current access situation compared with access "on reasonable terms and conditions as may be determined in the second stage of the Part IIIA process."[27] This was generally understood as immunising infrastructure from declaration, in circumstances where there was an existing legal right to access and reasonable commercial arrangements were in place.

... but the debate about 'criterion (a)' appears likely to continue in relation to gas pipelines

As noted above, the ACCC has recently called for a new 'market power' test to apply to gas pipelines. It considers the existing criteria – which currently mirror the Part IIIA declaration criteria – are deficient in addressing the "market failure ... [of] monopoly pricing that results in economic inefficiencies with little or no effect on the level of competition in dependent markets."[28]

If this new test was put in place, it would mean that virtually all (although perhaps not all) gas pipelines would become covered. This reverses the trend that we have seen over the last decade, during which regulated pipelines were progressively de-regulated. At the same time, investment in the gas pipeline sector has been significant - $30 billion industry wide and $12 billion by APA alone over the past 15 years.[29] While some safeguards in the regime will be retained,[30] any change to the coverage test has the potential to put investment at risk.

Nonetheless, the process still has some way to go. The AEMC in its market review final report in May 2016 noted the ACCC's recommendation to implement a 'market power' test, but did not explicitly support any amendment to the coverage criteria.[31] Instead, the AEMC report focussed on market mechanisms, such as increasing market transparency and introducing regulated secondary trading of capacity.[32]

In response to the ACCC and AEMC reports, the COAG Energy Council has established a Gas Market Reform Group and appointed Dr Michael Vertigan AC as Chair. The Vertigan-led group will conduct a review of the gas coverage criteria. In particular, the group will analyse the evidence that the ACCC considers supports its new 'market power' test, consider whether the proposed new test better meets objectives than the existing coverage criteria, and assess whether the proposed new test would lead to a net benefit. The group will also examine whether there is support for the ACCC's claim that pipelines subject to full regulation can still exercise market power.[33]

A common thread between Glencore and the East Coast Gas Inquiry is a focus by the ACCC on asset values to seek to establish market power

The ACCC considers that evidence of monopoly pricing supports its proposed 'market power' test to apply to gas pipelines.

While the ACCC noted that it was "beyond the scope of this Inquiry to carry out a detailed forensic examination of the prices charged by every pipeline on the east coast to determine whether they involve the exercise of market power,"[34] the ACCC analysed the return on pipeline projects against the AER's estimate for the return on equity and considered that the significant differences (all but one projects has a return 1.4-20 times higher than the AER's estimate) are consistent with a "significant degree of market power that existing pipeline operators can use." [35]

25 Australian Government, Response on the National Access Regime, 24 November 2015, p 2.
26 Application by Glencore Coal Pty Ltd [2016] ACompT 6 [33], [67].
27 Pilbara Infrastructure Pty Ltd v Australian Competition Tribunal (2011) 193 FCR 57 [112].
28 ACCC, Inquiry into the east coast gas market (April 2016) p 18.
29 See, Nevenka Codevelle, "How should regulation address the possible market power of non-vertically integrated monopoly infrastructure?", Address at ACCC/AER Regulatory Conference (4 August 2016) <https://www.apa.com.au/globalassets/documents/news-2016/20160805-media-statement-accc-aer-regulatoryconference2016-speech.pdf>.
30 These safeguards include the 15 year no coverage option for greenfields pipelines and light handed regulation.
31 AEMC, Stage 2 Final Report – East Coast Wholesale Gas Markets and Pipeline Frameworks Review (23 May 2016) p 18.
32 Ibid.
33 ACCC, Inquiry into the east coast gas market (April 2016) p 11.
34 Ibid p 104.
35 Ibid p 105.

Similar analysis was undertaken by the ACCC recently in respect of the Port of Newcastle (which was privatised for $1.75 billion, a multiple of 27 times of earnings) and Sea Swift's acquisition of Toll Marine Logistics business, which was bought at a substantial premium over book value. In both of these cases, the ACCC's view was that there was a premium paid for the acquisition of market power.[36]

This increasing reliance by the ACCC on asset values (or earnings multiples) to support a finding of market power is problematic. The fact that the commercial return expected for a project is higher than the AER's or ACCC's estimate of a "reasonable" return on equity, or that an acquirer has paid a premium on book value for an asset is not – in and of itself – sufficient to support a finding that an infrastructure owner has market or pricing power. There are numerous reasons why book value for an asset may be different from its current market value, entirely unrelated to market power.

IN WATER, AND POTENTIALLY SOME OTHER UTILITY SECTORS, THERE COULD WELL BE A MOVE TO A NEW AND INNOVATIVE 'CONSUMER CENTRIC' MODEL OF TARIFF REGULATION

Is it time to go to RIIO?

Most access regimes in Australia are cost-based and involve some form of "building block" tariff-setting model.

In many circumstances, where demand is stable and costs are relatively constant and predictable, this model is likely to continue to provide an efficient means of regulating utility infrastructure tariffs. However, during 2016, the ESC in Victoria has commenced interesting work looking at an alternative model implemented in the United Kingdom by the energy and water regulators (Ofgem and Ofwat).

The UK approach (referred to as the Revenue = Incentives + Innovation + Outputs or 'RIIO' model), builds on the traditional approach but is led by network engagement with consumers, rather than the regulator. The ESC in Victoria has developed a variant to this approach, which it describes as its 'PREMO' framework.[37] Under this framework, networks engage with customers directly to set their regulatory objectives and can seek a number of benefits, including a faster regulatory review and potentially a higher rate of return, if they can deliver 'over-performance'.

In the UK, Ofgem has argued that the RIIO model:

+ puts stakeholders (including consumers) at the heart of the decision-making process;
+ encourages efficient investment in network infrastructure; and
+ encourages innovation to reduce network costs for current and future consumers.

The model was introduced by Ofgem to accommodate the structural changes that are occurring in the UK electricity sector.

The PREMO model is both interesting and innovative – and may well provide a blueprint for how the regulatory and tariff setting could be developed in consumer-orientated, utility markets over coming years.

36 For example, see Application by Sea Swift Pty Limited [2016] ACompT 9 [107].
37 Essential Services Commission, Review of Water Pricing Approach – A New Model for Pricing Services in Victoria's Water Sector: Position Paper (May 2016) pp 36–48.

INSTITUTIONALLY – A NATIONAL REGULATOR SEEMS INCREASINGLY UNLIKELY AND MERITS REVIEW IS UNDER SERIOUS THREAT

In its final report, the Harper Review Panel recommended that the energy, water and telecommunications functions (as well as general declaration functions under Part IIIA) all be merged into a single regulatory agency.[38]

This followed a similar recommendation in the Vertigan Review of the telecommunications framework, which had suggested that a single network regulator would be beneficial as *"there are now sufficient commonalities between regulated industries — for instance, the reliance on what amounts to a 'building blocks' model of price-setting — as to create opportunities for economies of scale and scope in network access regulation."*[39]

We have previously looked at the pros and cons of a single access regulator – and also noted that the task of implementing such as body would be complex, particularly given the need for support from various state governments (see here).

The Australian Government's response to the Harper Review[40], released in November 2015, kicked the can down the road on this recommendation – committing only to further discussions with the states and the issue has not been mentioned since. It seems to us that the legal complexity and political sensitivity around consolidating these various regimes is likely to mean the recommendation is not pursued.

However, while that issue appears to have subsided, a critical debate continues around the institutional framework during 2016 – notably in relation to the limited merits review process in energy markets. The COAG Energy Council is undertaking its review of the limited merits review framework in the National Electricity Law and the National Gas Law.[41] There is a real risk that all merits review in electricity and gas may be removed, as occurred in 2010 in relation to telecommunications.[42]

While there are well-recognised difficulties with the merits review processes, these stem from the way in which the current framework produces a series of overlapping decisions and associated reviews. In part, this also reflects the fact that the merits review provisions were only revised in 2012, and are therefore still in the process of being clarified and tested. However, many of the process concerns with merits reviews could potentially be resolved through a more streamlined process, such as that which occurs in New Zealand where key "input methodologies" are determined by the regulator once (and reviewed once) before being applied across subsequent decisions, with no subsequent right to merits review.[43]

Importantly, as well as providing important accountability for regulatory decisions, merits review frameworks provide greater flexibility and scope for the involvement of consumer groups and other stakeholders, when compared with judicial review. Indeed, a number of the merits review processes to date have involved input from peak consumer bodies and state ministers, both through 'community consultation' processes undertaken by the Tribunal as well as directly participating as interveners. The judicial review process, by contrast, is adversarial, costly and limits participation to directly affected parties and the regulator.

38 See Competition Policy Review Final Report: Part 2 - Recommendations (2015) pp 79-80 ("The Harper Review"). .

39 Australian Government, NBN Market and Regulation Report, Volume 1 – NBN Market and Regulatory Report (2014) p 291.

40 Australian Government, Australian Government Response to the Competition Policy Review (2015) <http://www.treasury.gov.au/~/media/Treasury/Publications%20and%20Media/Publications/2015/Government%20response%20to%20the%20Competition%20Policy%20Review/Downloads/PDF/Govt_response_CPR.ashx>.

41 See COAG Energy Council, Review of Limited Merits Review Regime: Consultation Paper (6 September 2016) <http://www.coagenergycouncil.gov.au/publications/review-limited-merits-review-regime-consultation-paper>.

42 See Telecommunications Legislation Amendment (Competition and Consumer Safeguards) Act 2010.

43 See Commerce Act 1986 (New Zealand) Part 4, ss 52Y, 52Z.

12 MONTHS IS A LONG TIME IN INFRASTRUCTURE

SEPTEMBER 2015

+ ACCC submission into Port of Melbourne privatisation process

OCTOBER 2015

+ Brookfield / DBCT ACCC red light Statement of Issues

NOVEMBER 2015

+ Australian Government responds to Harper Review and PC Review

MARCH 2016

+ Federal Court hears judicial review of ACCC tariff determination for Telstra fixed line services

APRIL 2016

+ ACCC releases East Coast Gas Inquiry Final Report
+ IPART publishes a discussion paper on wholesale water charges for Sydney Water

JUNE 2016

+ Tribunal decision to declare shipping channel service at the Port of Newcastle (Glencore)

JULY 2016

+ ACCC declares superfast broadband access service
+ Qube consortium / Asciano – obtains ACCC merger clearance
+ Competition Tribunal decision in Sea Swift
+ AEMC publishes final report on East Coast wholesale gas market and pipeline framework

AUGUST 2016

+ ACCC commences market study of the communications sector
+ ACCC releases guidelines for Part IIIA access undertakings and Part XIC declaration
+ Two consortiums / Port of Melbourne - ACCC merger clearance
+ AER publishes draft Ring Fencing Guidelines

SEPTEMBER 2016

+ ACCC commences wholesale domestic mobile roaming service inquiry
+ Harper Review exposure draft legislation released

OCTOBER 2016

+ ACCC issues draft decision in declaration enquiry for wholesale ADSL
+ Aurizon UT4 final decision (QCA)
+ GRail / Hunter Valley ACCC publishes amber light statement of issues
+ Full Federal Court hears judicial review of the Tribunal's merits review decisions in respect of NSW electricity networks

NOVEMBER/ DECEMBER 2016

+ COAG Energy Council undertakes review of limited merits review framework
+ Vertigan review of market power test of gas law
+ Final AER Ring Fencing Guidelines
+ QCA publishes final decision in relation to DBCT access undertaking
+ ARTC lodges draft replacement undertaking for Hunter Valley network

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