

the **N**etwork Industries quarterly



Consumer involvement

in

network industries' regulation

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This issue of Network Industries Quarterly focuses on the question of consumer involvement in the regulation of the network industries, a topic we have not addressed so far. The issue features four unique contributions, all especially written for this issue. They are based on presentations made by the four authors during the ACCC/AER Regulatory Conference 2013 held in Brisbane on July 25th and 26th 2013, and whose special focus was precisely on “Consumer involvement and pricing”. I would like to take this opportunity to thank the Australian Competition and Consumer Commission (ACCC) for having organized such an interesting conference and the authors for having agreed to write up their presentations for this newsletter.

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Customer Involvement: Frontier or Smokescreen?

Catherine Waddams*

The appropriate involvement of customers in regulation depends crucially on the rôle of the regulator vis à vis customers and consumers, which in turn is determined by the statutory framework. The framework and the relationship of the regulator to customers also needs to be discussed in the context of the reasons for economic regulation, which was originally introduced because of monopoly power and (usually) private ownership. As privatised markets develop, the rôle of the regulator will also depend on how much choice the customer has, i.e. whether they face a monopoly or can exercise choice between several suppliers. If customers cannot exercise any choice, they rely on the regulator to express their voice as an alternative (Harker and Waddams Price, 2007). The balance between these functions will also depend on whether the customer(s) exercise any countervailing power, and so provide potential for a negotiated settlement.

Moreover the appropriate involvement of customers and the regulator's role will also determine what information the regulator requires about customer preferences, and the most appropriate institutional framework for gathering and representing those preferences. The very presence of a regulator suggests that these cannot be fully expressed through markets.

The regulator's role could be pictured in one of three basic ways.

In the first, the regulator is acting on behalf of customers, mediating between the customers (who are many and disparate) and the company which is a monopolist, or yields substantial market power, and who would otherwise be able to exploit customers. The model could be depicted as follows:

This reflects a primary statutory duty of protecting customers. In this case the regulator needs information about customer preferences in order to make trade offs between price and other dimensions of the product, such

as quality or reliability of supply. The most appropriate way of acquiring such information would be through an internal advisory body, which can collect information on customer preferences and incorporate these in the regulator's decisions. Such a model is consistent with either a consumer or total welfare maximisation objective, and



the establishment of the Customer Consultative Group to advise the Australian regulator on the issues of concern to users and consumers is an example of a regulator taking responsibility for understanding customer needs, rather than expecting the companies to do so.

However the second potential model of regulatory action is more likely to take a total welfare maximisation approach, since it focuses on that of a referee between customers and companies, taking both viewpoints into account.



In this model customers, like companies, represent their own views externally to the regulator, who then decides on the relative merits of the cases. This is similar to situations where separate statutory bodies are created, for example the Electricity and Gas Consumers' Councils, and their successors, Energywatch, in the UK. The statutory consumer body has some powers to bring matters to the attention of the regulator, and the prime responsibility for representing the views and preferences of consumers. Of course this raises questions of which consumers should be represented, given that there may be conflicting interests between consumers, but these issues are also present if the regulator internalises the issues. They merely become more explicit if there is a separate organisation

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which needs to speak publicly with a single voice on behalf of customers.

There has been increasing concern, reflected in regulatory practice, that either of these models may distort the legitimate relationship between the company(ies) and their customers. This situation arises from the regulator's role in determining the allowed revenue for the regulated companies. To the extent that the regulator has these powers, through price cap or rate of return regulation (or, as is usual, a mixture), companies may see the regulator as their true client, and become distanced from those to whom they supply services. This in turn puts an additional burden on the regulator to identify customer preferences, since the companies are less interested in their customers, and may hide behind the regulator as an excuse when there are complaints, for example about service quality.



Here the appropriate relationship between the customer and the company(ies) is hijacked or bypassed because the regulator is 'in the way', and the company(ies) are focussing on the regulator rather than the customers. There have been several attempts to reconstruct such a relationship, for example by making the Customer Challenge Groups an integral part of the current Ofwat determination. In developing their business plans for the 2015-2020 price determination, companies had to establish and consult an independent CCG, and include their perspective in the development of the plan. In assessing the acceptability of the plan, the regulator included the way in which the company had involved the CCG. So the regulator was re-establishing direct contact between the regulator and a representative customer group, while retaining oversight both of the process of that relationship, and the outcome of the plan itself.

A more direct application of this model arises in negotiated settlements, where there are a number of large customers who are encouraged to come to an agreement with suppliers without the involvement of the regulator, except when discussions break down. Such negotiations in the US, Canada and the UK have met with varying success (Littlechild, 2011), and have the advantage of not requiring an alternative institutional body to facilitate customer involvement. But such negotiations are unlikely to be practicable when there are large numbers of disparate

consumers at household level.

Any of these models are likely to call on customer involvement to solve one of three forms of asymmetry. The most obvious, emanating from model 1, and the view that a regulator protects consumers in much the same way as a competitive market, is asymmetric power. Individual atomised customers, including residential users and small enterprises, have little power to counter the deep pockets and exploitative incentives and abilities of a monopoly. But associated with this asymmetry will be asymmetry of information for the regulator, for example on how customers value quality versus lower price. This is particularly acute in networks, where the same quality of service is necessarily shared by all users, and so a common level needs to be determined. Such decisions also have delicate political dimensions. Is it appropriate for lower income areas to receive a lower quality of supply at a cheaper price if this group of consumers prefers this trade-off?

The salience of the decisions is also likely to be asymmetric: energy or water bills may be a relatively small part of an individual customers' bill, or a household's expenditure, while a small difference in allowed rate of return will make a huge difference to the profit levels of a monopoly.

Some awkward questions

Customer involvement raises some awkward questions. Who should pay for the customer involvement, and what will be the objectives of any new body? Will it need to justify its budget by producing some 'eye-catching' outcome? If so, this may distort the areas which the body chooses to work on or publicise. What are the reasonable expectations of the body, either by its funders or society more generally? What media or political pressures may it face, and how will this affect its approach to its work?

In terms of its representative or advocacy rôle, how is the body to represent the varying interests of different customers and customer groups? Even when the interests of such groups are not mutually contradictory (as for example might arise in issues of tariff structure), some aspects will be more salient and important to some customers than others. How are these different interests to be balanced in the work and presentation of the organisation?

In particular, should customer involvement focus on average or vulnerable customers? Will the loudest voices (squeakiest wheels) get the oil and the results they would like? How might suppliers in this market, probably already highly politicised, try to influence the customer involvement group and/or the major players within it?

Even more fundamental questions surround the authority of the group. Is the customer always right? In particular, since the sectors concerned are likely to involve large and long lived investment, can we ensure an appropriate balance between future and current consumers? Here current pressure for quick results may well favour the current customer, through lower immediate prices, at the expense of investment which will benefit future generations. Although on average buyers do seem to behave 'rationally' in responding positively to greater expected gains and shorted anticipated switching times (Waddams Price et al., 2013), there is widespread evidence of consumer 'errors' when they are given choices in real markets. For example, there is high customer inertia (especially among small and medium sized enterprises and household consumers), with money apparently 'left on the table' through ignoring better deals. Amongst consumers who do switch, many make mistakes, switching to more expensive deals even when they are only trying to save money (Wilson and Waddams Price, 2010). Consumers show considerable heterogeneity in their activity levels, and differ in their attitudes and the drivers for switching (Waddams Price et al., 2013; Flores and Waddams Price, 2013). Individuals have particular difficulty in evaluating low-probability high-cost events such as natural disasters, but these are precisely the type of incident for which robustness (and cost) decisions about networks need to be made. Individuals are also notoriously inconsistent in evaluating the positive value of additional security against the negative implications of lower security, exhibiting strong framing biases. It is even more difficult to aggregate such preferences into consistent group valuations; a customer body will have no more tools to do so than others, but may be expected to speak with a single 'customer voice'.

Other issues may arise over trading off equity and efficiency, a particularly difficult task in sectors which have previously been nationalised, often have strong monopoly elements, account for a significant part of household and

industrial budgets and where there may be widespread suspicion of the suppliers. Should the customer body processes which stimulate competition and deliver the lowest prices on average, but which may result in higher prices for some particular groups? Should its approach vary according to whether these higher prices result from higher costs or less price responsive demand? This latter question may depend partly on statutory requirements on non-discrimination and how these are interpreted by regulators and courts.

Should these questions be resolved internally by the customer body, or should customer involvement consist of identifying issues and presenting them to the regulator to determine? Should they be decided separately for each sector, or consistently across the country? Or, in the case of Europe and the United States, across States?

These considerations suggest that the increasing focus on customer involvement is appropriate and may raise publicly issues which are intrinsic to regulated sectors. BY placing emphasis on these important issues, and helping to forge new relationships between suppliers and customers, it can indeed present the promise of a new frontier. But it cannot resolve these issues, and there is a danger that overoptimistic expectations may enable the erection of a smokescreen rather than encourage welfare improving outcomes.

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The role of Consumer Advocate in Australia's National Electricity Market Lessons for Australia from the Pennsylvania OCA

Rachel Trindade*

On 1 July 2014 Australia's new national energy consumer advocacy body, to be known as Energy Consumers Australia (ECA), is due to commence.

This article provides some background to the establishment of this new body, in particular the debate about the role for consumer advocates in Australia's National Electricity Market and draws some lessons from the success of the Pennsylvania Office of Consumer Advocate (OCA) in the USA.

When the Council of Australian Governments endorsed the proposal for a national energy consumer advocacy body in December 2012, it did so at a time of strong community concern that retail electricity prices were "too high", the consensus being that the main cause lay with the regulated network component of electricity prices. Network businesses pointed to the cost of replacing aged assets and meeting community expectations on reliability, but public opinion blamed pricing rules that encouraged "gold-plating" and a review regime that allowed regulated businesses to "cherry pick" parts of pricing determinations in order to achieve higher regulated prices.

Overall there was a widely held perception that the regulatory process had lost sight of the consumer interest and there were calls from existing consumer advocacy and social welfare groups for a national consumer advocate. It was argued that, looking at models in other jurisdictions, Australia could benefit from having a consumer advocate act as a "contradictor" to network businesses in the regulatory process.

Some background to the NEM

The National Electricity Market (NEM) spans the eastern and southern parts of Australia (and covers most of the country's population). The NEM grid covers 6 of the 8 Australian States and Territories and is the longest interconnected power system in the world.

The fundamental architecture of the NEM is decided by the various Federal and State/Territory Governments who meet on a regular basis. The cornerstone is the National Electricity Law which establishes the various bodies involved in the NEM structure and sets out a high level objective those bodies must try to achieve in performing their functions (the National Electricity Objective) being: "...to promote efficient investment in, and efficient operation and use of, electricity services for the long term interests of consumers of electricity with respect to — (a) price, quality, safety, reliability and security of supply of electricity; and (b) the reliability, safety and security of the national electricity system."

Under the National Electricity Law sits a more detailed level of rules (the National Electricity Rules) made by an independent statutory body, the Australian Energy Market Commission (AEMC). Rule changes are assessed by the AEMC in a very transparent and consultative public process in which existing consumer bodies and other interested parties participate by way of written submissions.

At an operational level, the Australian Energy Market Operator (AEMO) controls the NEM grid with respon-

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This article was adapted from a presentation to the ACCC/AER Regulatory Conference held on 25-26 July 2013 in Brisbane, Australia, commenting on a case study in consumer engagement by Sonny Popowsky, former Consumer Advocate of Pennsylvania. Mr Popowski's presentation outlining the structure, role and effectiveness of the Pennsylvania Office of Consumer Advocate is available on the ACCC website (www.accc.gov.au).

sibility for transmission planning and operates the wholesale spot market through which all electricity is traded.

Economic regulatory functions are carried out by the Australian Energy Regulator (AER), which sits within the Australian Competition and Consumer Commission (ACCC), including the determination of maximum prices/revenue for the NEM's 5 electricity networks, two cross-border interconnectors and 13 major distribution networks. The National Electricity Law contains revenue and pricing principles for these regulated networks and the National Electricity Rules provide a framework for making 5 year revenue determinations in accordance with these principles using a "building block" approach.

In the regulatory process, network businesses submit a revenue proposal and the AER (after various consultations with stakeholders) makes a revenue determination. These revenue determinations are subject to a limited form of administrative (merits) review by the Australian Competition Tribunal (an administrative review body that sits under the jurisdiction of the Australian Federal Court) and also judicial review by the Federal Court.

Part of the debate about the need for a new consumer advocacy body has been in the context of decisions by the Tribunal to increase the amount network businesses may charge, existing consumer bodies having experienced difficulties trying to participate in these reviews.

Those experiences have also led to changes to the limited merits review regime which came into effect in December 2013. Previously, an expert panel advising on reforms to this regime (Yarrow et al 2012) had recommended that merits reviews be conducted by a new more informal review body (not the Tribunal) "with an administrative and more investigative and inquisitorial approach, more akin to an audit process" so consumers and consumer bodies could participate with no legal representation. The expert panel's view was this would mean no need for a new consumer advocacy body. However, the eventual reforms implemented did not go this far, although there will be a further review of the Tribunal's role by 1 December 2016.

The lightning rod for change

Over the past few years retail electricity bills have risen on average by around 40%, most of which is attributable to the regulated network element which accounts for around half of the average household electricity bill. This has resulted in dissatisfaction with the way regulated

prices are determined and the way merits reviews of these determinations have been handled.

So, for example, in some of the political/policy debates towards the end of 2012, comments were made such as those by the Senate Select Committee on Electricity Prices to the effect that the National Electricity Objective had "lost its primacy as the main consideration for regulatory and policy decisions. Its pre-eminence should be restored by giving consumers much more power in the regulatory process". There were also suggestions such a body could act on behalf of consumers in reaching negotiated settlements with network businesses as happens in some other jurisdictions.

Less discussed was the issue of just how such a body would fit with the existing NEM architecture and what structural elements of other jurisdictions make such consumer outcomes possible.

Legal roles in regulatory regimes

The two basic legal functions for a consumer body in a regulatory regime are input (advisor) role and counterparty (adversary) role. These roles are not mutually exclusive and a consumer body can play both roles - however, to produce successful outcomes these roles do require different architecture.

To date, existing consumer bodies have played an input role in the Australian context.

There have been some attempts by user groups to intervene in the review of regulatory decisions. However, the first serious attempt by consumer bodies to take a counterparty role (of the kind seen in other jurisdictions) was the unsuccessful attempt by two consumer bodies to participate in the 2011 review application by Victorian distribution businesses before the Tribunal.

Speaking in detail about this at the ACCC/AER 2012 Regulatory Conference, Jo Benvenuti the Executive Officer of the Consumer Utilities Advocacy Centre (CUAC), posed the question: "Is it acceptable that we have to rely upon the body that made the original decision to act as the primary counterweight to distributor interests in the current merits review regime? Will the AER appeal their own decision if they erred in favour of the regulated businesses?" (Benvenuti 2012)

There was considerable discussion of the difficulties faced by these consumer bodies in the legal session

of the ACCC/AER 2012 Regulatory Conference. As the Executive Officer of the CUAC explained: "... this project had no precedent and we were about to learn some big lessons about the challenges that lay ahead." In the end, the consumer bodies concluded that the obstacles to participating as a counterparty in the merits review process were insurmountable.

Around the same time momentum was gaining for the view that "empowering" consumers in the regulatory process by allowing them to participate in more of a counterparty role would go a long way to addressing community concerns that the NEM regime had lost its way.

In January 2012, the Productivity Commission (the Australian Government's independent economic research and advisory body) had been given the task of reviewing existing electricity network regulation in light of a sharp acceleration in network costs in the period since 2007.

The Productivity Commission's June 2013 final report identified a number of flaws in the regulatory regime and referred to – "widespread dissatisfaction with consumer engagement in electricity network regulation ..., and a view that, regulators in other countries engage with consumers or consumer representatives more than the AER". (Productivity Commission 2013)

The Productivity Commission saw ... "value in strengthening the institutional capacity for consumers to have a voice in regulatory and merits review proceedings" and in particular arrangements that ... "give consumers a formal capacity to engage with NEM institutions in their processes and with the scope to participate in the negotiation of regulatory determinations with network service providers, a model that has apparently worked well in the United Kingdom and the United States."

Against this backdrop of interest in the counterparty role, at the ACCC/AER 2013 Regulatory Conference, the former Consumer Advocate of Pennsylvania Sonny Popowski presented a case study of a successful US consumer advocate that has been able to deliver the level of public trust and confidence that the Australian community was clearly looking for in relation to the workings and outcomes of the NEM regime (Popowski 2013). The insights from this case study prompt a number of issues for Australian policy makers to consider about consumer bodies playing an input or counterparty role in the NEM regime.

The input (advisor) role

The input role is basically about providing demand side information and perspective to a wise decision maker who can then be trusted to make the 'right' decision. As such, consumer input is part of the consultation process of this wise decision maker so it has all the information it needs to reach the right decision. Consumers 'speak into the ear' of the regulator; they have limited direct interaction 'face to face' with the regulated business.

A regime that relies on the consumer role being an input role can work – if the rules are calibrated towards the consumer interest (so the 'right' decision is one which protects the consumer) and everyone understands (and agrees) that that this is how the regime should work.

The rules need to be calibrated towards protecting consumers because consumers are not at the table to negotiate for themselves. The regulator sits across the table from the regulated business and therefore has to find the outcome that best protects consumers. That does not necessarily make the regulator a consumer advocate as such – and it is important to acknowledge this – but it does mean the regulator cannot really stay completely neutral.

In such a regime, the role of merits review takes on a special character; it gives the regulated business some comfort against the possibility that the regulator might go too far in protecting the consumer interest.

Businesses are typically nervous about regulators "championing" consumer interests. That was the underlying sub-text to past criticism from some business circles that the AER is "too close" to the ACCC (the ACCC being recognised by the community as a strong protector of consumers). This nervousness can lead to regulation being perceived (or portrayed) as unfriendly to investment.

Indeed, looking back to the debates occurring in Australia in 2004 about the changes to the NEM institutional arrangements that, among other things, saw the creation of the AER, the initial position was for no merits review of AER decisions (just judicial review). Businesses argued strongly for merits review as one of the checks and balances against a perceived 'anti-investment' tilt in regulatory decisions (ie they assumed that the regulator would tend to err on the side of being 'too low') at a time when the policy concern was to improve the climate for investment.

More recently, the perception has been about the regulatory process having encouraged over-investment (ie an

assumption that regulated prices have tended to err on the side of being ‘too high’. For example, the Grattan Institute in a December 2012 report asserted that: “The regulator seeks to balance the interests of investors and those of consumers. It is now a widely accepted conclusion that the balance has shifted towards the former and that there needs to be a correction.” (Grattan Institute 2012)

So either policy makers have to deal with these swings of the pendulum (based on whether the public sentiment is to encourage investment or discourage over-investment) or policy makers have to move the NEM regime away from a model that assumes there is an optimal price and more towards the type of regime where a “neutral arbiter” merely aims for a reasonable balancing of the interests of investors and consumers in the circumstances and at a given point in time.

However, a regulatory process that involves a neutral arbiter naturally brings into play the issue raised at the ACCC/AER 2012 Regulatory Conference, namely that someone has to play the counterparty role before this neutral arbiter. As summarised by a former President of the Tribunal and former Federal Court judge Ray Finkelstein QC at the conference: “In other words, according to Professor Yarrow, the consumer interest should not be protected by the regulator. But, if not the regulator then who might the protector be?” suggesting that either a consumer advocate plays this role or the AER plays this role and the Tribunal becomes the neutral arbiter (Finkelstein 2012).

The counterparty (adversary) role

In the counterparty role, consumer bodies sit on the other side of the table from the regulated business. They are there to represent the people who pay the bills, negotiating before, or putting forward the other side of the story to, a neutral decision maker who has to balance the competing interests of supplier and customer, investor and user.

For example, this is the architecture behind the OCA and in particular the “just and reasonable” test in Pennsylvania. In the Pennsylvanian regime, the role of the regulator is to balance the interests of utility investors and consumers in determining rates that are “just and reasonable” to both the utility and its customers. So for example, at its most simplified, utilities argue reasonable means earning an adequate return and consumers provide the counter argument that reasonable means prices should nonetheless still be affordable.

This approach of striking a balance between two interests having heard the case ‘for’ and ‘against’ can provide more flexibility to adjust to the conditions of the day and offers scope to agree positions a regulator could not otherwise impose.

However, it is not unusual to find concerns in Australia that consumer bodies are ill equipped to take on any form of counterparty role and that they would be automatically “outgunned” if they tried to sit across the table from regulated businesses.

An April 2013 study by Bruce Mountain on negotiated settlements in the regulation of energy network service providers (Mountain 2013), articulated some of these concerns:

“While some small consumer advocates were receptive to the possibilities of negotiated settlements, others were quite hostile to the idea. Their main concern seemed to be that users could not deal with information asymmetries (relative to utilities) and so would be unable to effectively press their interests in negotiations with network service providers.”

“It was clear to us from discussion with many consumer advocates in Australia that they generally had little confidence in their knowledge of the electricity industry, and in their ability to negotiate successfully with network service providers. A necessary condition for the success of negotiated settlements is that consumer representatives have such confidence. The technical ability and organisational depth of energy user advocacy needs to be improved to achieve this.”

The Pennsylvanian OCA in the adversary role

One of the elements that led to the creation of the OCA in the 1970s was a clear public demand for direct consumer advocacy in rate regulation, there being a sense at the time that direct (adversary) participation would be an important step in securing trust and confidence in the regulatory process – the OCA would be a visible demonstration to consumers that there is someone ‘in their corner’ whose sole objective is to represent their interests.

Rather than presenting an obstacle to consumer participation, in the US the long standing history of litigation processes to deal with this ‘case for and against’ rate increases has provided a structure that facilitates formal consumer advocacy. For example litigation processes mean access to information (with an ability to deal with issues of

confidentiality) and in the US context there is little information that the decision maker sees which the consumer advocate cannot (one of the key obstacles encountered by Australian consumer bodies in their 2011 attempt to act as contradictor in a merits review).

The ability to use litigious appeal processes has also given teeth to the OCA in successfully negotiating outcomes with utilities.

To an Australian eye, the position the OCA has taken on issues and its approach to negotiation is characterised by a nuanced balance and sophistication that is often lacking in Australian public debate (which, tends to be couched in very adversarial ‘us v them’ / ‘good v bad’ language).

Yet, as the case study showed, the OCA has managed to achieve credibility with regulated utilities as a tough but pragmatic negotiator very much able to hold its own facing utilities across the table or in court – through the use of in-house expertise and outside expert witnesses – and it has achieved tangible financial outcomes for consumers.

The Australian architecture

Traditionally the NEM regime has assumed only an input role for consumer bodies not a counterparty role.

This has worked well in relation to policy making – for example, consideration of rule changes by the AEMC and the development of guidelines by the AER – where processes have been transparent and accessible to a wide range of consumer bodies allowing them to ‘have their say’.

However, it has proved to be more contentious in relation to influencing price outcomes. For example, some of the documented problems encountered by consumer bodies trying to participate in merits reviews before the Tribunal stem from architecture that opened the door to consumer groups to participate but implicitly assumed they would be doing so as intervener and not as contradictor.

The recent reforms to the limited merits review process will better suit participation by consumer groups in an input role. The expert panel looking at the limited merits review regime in 2012 (Yarrow et al 2012) made the point that their recommendations would negate the need for any consumer advocate to play a contradictor role – indeed they did not believe the AER should play a contradictor role (“Such a role would be inconsistent with an

investigative, non-adversarial review process. Nor should the conduct of the AER be that of a ‘model litigator’, since there is, under the Panel’s proposals, no litigation, and no quasi-litigation of the type found in court-like administrative tribunals.”)

Assuming that the revised merits review process effectively results in a neutral decision maker (the Tribunal) listening to a variety of inputs (regulated business, AER, consumer groups etc), what then is the position regarding the initial determination: is the NEM pricing standard sufficiently calibrated towards protecting the consumer against “excessive” prices (such that consumers don’t need a body like the OCA ‘in their corner’ to give public confidence)?

In that context it is interesting for Australians to hear that, in Pennsylvania, while efficiency is important, it is generally not the sole or primary standard under which rates are measured.

The 2012 limited merits review expert panel (Yarrow et al 2012) sought to “tweak” the National Electricity Objective in order to make it clear that efficiency is simply a means to get to a particular end – the end being an outcome that serves the long term interest of consumers – rather than efficiency as an end in itself. Their recommendation was that the objective should therefore be to promote efficiency in ways that best serve the long term interests of consumers.

However, (looking back to the 2006 reforms) that was not what policy makers intended. Indeed the expert panel on energy access pricing back in 2006 (Allen Consulting Group 2006) even questioned whether it was helpful to reference consumers in the objective at all. Put simply, since 2006 the pricing standard has been calibrated towards encouraging investment and protecting returns for those who invest – the context of that time being a policy concern that the search for what is optimal rather than what is reasonable had impeded investment and with the consequent risk of compromising Australia’s export potential over the next decade. So, for example, the pricing principles that run through the overall national approach to regulation seek to ensure prices are at least sufficient to provide appropriate returns.

The former Chairman of the Productivity Commission, Gary Banks, at the ACCC/AER 2012 Regulatory Conference sounded a reminder that: “More generally, while it is possible that particular regulatory regimes might be generous to service providers, it seems clear that regu-

lators should not ‘go to the wire’ in seeking to strip monopoly rents. There is more at stake here than the specific problem of regulatory truncation (which in fact involves inappropriate regulatory taking of a return that is not a monopoly rent). As in other markets, the prospect of earning rents is a driver of innovation in service provision and the investment to support it. The broad pricing principle now incorporated in regimes that regulated prices should be ‘at least sufficient to cover efficient long run costs, including a return commensurate with the commercial and regulatory risks’ therefore remains fundamentally sound.” (Banks 2012)

Protecting returns is not wrong or inappropriate – the point to consider is that having this without also recognising concerns like ‘affordability’ and ‘universal service’ can present problems in practical effect and ultimately lead to the perception that the regulatory regime has “lost its way”.

The ideal balance of recognising the need for an appropriate return and also matters like affordability and universal service, may well lead to a pricing standard something like the ‘just and reasonable’ test in the US architecture referred to above.

Australia’s new energy advocacy body

The ECA is currently taking shape. It will be a company limited by guarantee with a single member (being a Government Energy Minister) and a skills based Board comprising a Chair and four other directors, with a reference committee drawn from a broad cross section of consumer advocacy bodies and other relevant energy market participants.

The objective of the ECA will be: “To promote the long term interests of consumers of energy with respect to the price, quality, safety, reliability and security of supply of energy services by providing and enabling strong, coordinated, collegiate evidence based consumer advocacy on national energy market matters of strategic importance or material consequence for energy consumers, in particular for residential and small business customers.”

The ECA will absorb the functions of the current Consumer Advocacy Panel (CAP), an independent panel of experts that sits within the AEMC and facilitates advocacy by providing research grants and funding to consumer bodies wishing to participate in policy and regulatory processes (but does not engage in any direct advocacy itself).

It will also work alongside the Consumer Challenge Panel (CCP), a new development by the AER as part of its “better regulation” program. The CCP comprises a panel of experts appointed by the AER to provide internal advice to the AER about what is in the long term interests of consumers so that the AER can better take this into account during regulatory processes.

How the ECA and CCP will work together was questioned by the Productivity Commission: “The CCP could act as an effective voice for consumers in the short run until the establishment of the national advocacy body. However, given their strongly overlapping roles, the risk of confused representation by the same consumer constituencies, and the desirability that the AER be seen as a neutral player, there are compelling grounds for the Panel to be absorbed into a single independent statutory consumer body in the medium term.” (Productivity Commission 2013)

If the NEM rules are re-calibrated towards the consumer including matters such as affordability then there would be no need for any consumer bodies to play a counterparty role. On the other hand, if the rules are calibrated towards encouraging investment and protecting returns (which is not necessarily a bad thing) or there is a neutral balancing of interests then it would follow that – sooner or later – consumer bodies will need to step into more of a counterparty role.

The point is that form cannot be divorced from function when it comes to consumer advocacy. There needs to be a clear vision of what role the community expects the new Australian consumer advocate to play in the NEM regime and then a clear understanding of what form it needs to take in order to do this successfully (including whether the NEM architecture needs to be changed to facilitate this).

That is why the opportunity at the ACCC/AER 2013 Regulatory Conference to study how a successful US consumer advocate works was so timely for those working in the Australian regulatory space.

Some conclusions

The new Australian consumer advocate is not being set up to play a counterparty role like the OCA does – its role is still an input role. Of course it can still add value in that type of role – but the community should not expect it to do something it is not set up to do.

In that regard, it should be kept in mind that other changes have been made to the overall regime to improve the ability of a consumer advocate to influence outcomes via an input role – for example the changes mentioned earlier in relation to merits reviews and also some changes aimed at giving the regulator more flexibility in relation to key areas that determine price outcomes such as rates of return and capital expenditure. The public perception seems to be that the regulator will use that flexibility to keep prices down. So a input role may well prove to be sufficient in terms of current community expectations.

However, the fundamental efficiency standard of the NEM with its focus on protecting returns, as discussed earlier, remains (with its underlying premise that it is better to err on the side of generous prices than to ‘go to the wire’ and deter investment). So, the chances are that, from time to time, as the pendulum swings between concern about encouraging more investment and concerns about discouraging over-investment or ‘gold-plating’, there are bound to be calls for consumer bodies to play a counterparty role.

Looking at the OCA as a case study of a body which does play a counterparty role (and does so effectively), three things stand out from an Australian perspective –

- The “just and reasonable” standard is very important – would the OCA be as effective under an “efficiency” standard?
- Also important is the strong presence of legal expertise within the OCA (with salaries the major component of its budget).
- Further, the OCA’s counterparty role in negotiated settlements (and its ability to go to court if required) plays an important part in establishing the credibility of the OCA both with consumers and with utilities and enhances the effectiveness of its input role.

Of course, without the historical background of litigation processes that exists in the United States, moving to the type of counterparty role played by the OCA would present some cultural and practical challenges for Australia. But the case study of the OCA provides a glimpse of what an Australian consumer advocate might be able to achieve should policy makers decide to head further down the counterparty path now or in the future.

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The European approach to regulation: implications on consumer protection

Matthias Finger*

ABSTRACT

This contribution outlines the European approach to consumer protection, better known by the term Universal Service. In this paper I will proceed in three steps: I will first present Europe's – or rather the European Commission's (EC) – approach to regulation (the so-called identity question), then show how the EC proceeds to implement such regulation (the means question), and finally the challenges this approach leads to.

This contribution argues that, in the European Union, consumer protection and corresponding regulation follow a quite unique philosophy and approach, as compared to the rest of the world, especially the United States. As a matter of fact, regulation in Europe, be it in matters of consumer protection or more generally, is not simply something regulators do. Rather, it is the core identity of the European project, something Giandomenico Majone has called “Regulatory Europe”. Similarly, and unlike in the United States for example, consumer protection is just one of the functions regulators perform.

The European regulatory approach to consumer protection

For the European Commission (EC) regulation is before all a means for political integration. In other words, the market and its (inevitable) regulation (at least in certain industries, especially the network industries) is a tool and not a goal. This sets Europe apart from the so-called Washington consensus (World Bank and International Monetary Fund), and from neo-liberal economists more generally, for whom the market is a goal in itself. Rather, for the EC the goal is a politically integrated Europe, which, of course needs to be competitive on a global scale (as a politically integrated one). Regulation – or rather de- and re-regulation – is the process or the means by which such market and political integration is going to come about.

As such a means of political integration, the European approach to regulation is a top-down one. This very approach sets Europe again apart from the United States, where regulation follows before all a bottom-up approach, perfectly in line with liberal market theory: regulation takes place first of all at the State level, where monopolies

persist. As such it is performed by the different states' Utilities Regulatory Commissions. The federal government only intervenes in a subsidiary manner, namely each time when inter-state commercial activities are involved and where the state-level Utility regulatory Commissions are unable to intervene. This is typically the case of FERC or the FCC.

The implications of these two characteristics and fundamental differences between the United States and the EC (i.e., political integration versus market and top-down versus bottom-up) on consumer protection are particularly relevant: if in the United States consumer protection is handled primarily at the level of the different States through the Utilities Regulatory Commissions, consumer protection in the European Union is handled at the level of the Commission with the national regulators being reduced to implementing agents: in other words, consumer protection follows a top-down approach, whereby the EC sets the principles of consumer protection – the so-called Universal Service Obligation (see below) – along with the minimal standards that each member state may not undercut. If in the United States consumer protection is primarily a means to protect the consumers from the monopoly, in Europe, instead, it is a means to protect the European citizens from the forces of the market, which may (or may not) lead to monopolies, cartels or other problems that are detrimental to the consumer/citizen.

This latter point deserves an additional explanation, as it is contrary to liberal economic principles, yet perfectly logical if one considers the European project of political integration: as said above, for the EC creating a European wide market in the different industries (in particular the network industries) is a means of political integration. Such political integration is achieved by the creation of

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competition among former state monopolies (along with their unbundling, see below). However, if these former monopolies are to compete, they will do so at the detriment of so-called Public Service, i.e., the services they were able to provide to their (national) citizens precisely thanks to their monopoly, i.e., by virtue of cross-subsidizing non-lucrative market segments with the lucrative ones. In other words, the creation of an internal European market will jeopardize the Public Service many European citizens were used to, be it in telecommunications, postal services, railways, electricity, water, etc. Consumer protection, therefore, is something the EC must put into place so as to protect the weakest European citizens from the competition it is actively promoting.

It is worth mentioning that the approach promoted by the EC also sets Brussels apart from London, and this mainly for two reasons. On the one hand, the UK belongs to the Anglo-Saxon tradition of the so-called “public interest”, and as such has never subscribed to the Latin Public Service philosophy, whereby the State is responsible for certain services it owes to its citizens. On the other hand, the UK approach to reforming the network industries’ sectors preceded the reforms of the European Union and as such was characterized by the privatization of public monopolies, rather than by the creation of competition. It is therefore logical that, in matters of consumer protection at least, the UK rather followed the US approach of protecting the consumers from the monopoly.

How does the EC proceed?

Creating competition, (infrastructure) markets and ultimately political integration implies the “killing of the national monopolists”. Even if the stated argument is to get rid of monopolies for economic reasons, i.e., because of their inefficiency and subsequent negative consequences on national and especially European competitiveness, the ultimate goal of course political: by killing the monopolist, i.e., generally the State-Owned Enterprises (SOEs), the Commission can simultaneously weaken the European national governments, which are, in the eyes of the Commission, one of not the major obstacle to European integration.

And as, for political reasons, privatization is out of question, killing the monopolist takes the form of so-called “unbundling”, i.e., separating the monopolistic activities (infrastructures) from the potentially competitive activities (services) in the different network industries. Again, the argument is economic and refers to the alleged efficiency of unbundled firms, as demonstrated mostly by institutional economists, many of whom have been Nobel prize winners (Baumol, Coase, Demsetz, Williamson). Yet, besides weakening the SOEs (and their respective governments), unbundling also serves the purpose of fostering single and integrated European infrastructures. In the case of electricity, this project of a seamless European-wide

infrastructure has become known by the term “copper-plate Europe”. Yet, similar projects exist in case of air traffic control (the “air transport infrastructure”), called “Single European Sky”, as well as in transport (Single European Railway Area and a Single European Transport Area across the modes more generally). While the operators of these perfectly interoperable and interconnected infrastructures may still be separate entities, the regulation of these European-wide monopolistic infrastructures should, in the eyes of the Commission, ultimately be integrated into one single European regulatory body, such as ACER in electricity, EASA in air transport, EA in railways, BEREC in telecommunications, etc.

The unbundled service providing parts of the former state-owned monopolies (the so-called “service providers”) are to become “real firms” operating along business principles only and competing against each other on the basis of such a seamless European-wide infrastructure. Consequently, sector-specific regulation (which will always be necessary given the existence of an infrastructure monopoly) will make sure that the competing forms (service providers) enjoy a non-discriminatory access to the European-wide infrastructure.

This is of course a gradual and stepwise approach: to recall, in each of the sectors the Commission proceeds along different steps, namely from accounting to full-fledged ownership unbundling, with all kind of intermediary steps such as functional unbundling, legal unbundling, and many others more. Parallel to gradual unbundling, the remits and powers of regulators are also gradually expanded and corresponding national regulatory bodies are set up in each of the infrastructure sectors. And, in parallel coordinating bodies of these national regulators are set up at the European level, as already mentioned above. As this is before all a sectoral approach, each of the sectors has its own rhythm and therefore proceeds in its own way. The drawback of this approach of course is that it lacks coherence and is particularly problematic when it comes to intermodal competition and regulation.

In the same way as the EC is building up a European-wide infrastructure, a European-wide market for infrastructure services and an European-wide regulatory framework and practices to make such a system work in all the infrastructures (air transport, railways, road transport, waterways transport, electricity, gas, telecommunications and to a lesser extent postal services), it is also setting up corresponding consumer protection. In order to do so, it has developed its own concept of a so-called Universal Service. Conceptualized for the first time in the 1992: Green paper on Postal Services, the “universal postal service (is) conceived as a right of access to postal services for users, encompassing a minimum range of services of specified quality which must be provided in all Member States at affordable prices for the benefit of all users, irrespective of their geographical location”. The concept has since been

extended to telecommunications and is implicitly present in most other infrastructures, such as for example in the case of passenger rights in air transport and railways.

In other words, the Universal Service (or Universal Service Obligation, USO) constitutes the unique European approach to consumer protection in the context of creating single European (infrastructure) markets, ultimately aimed at political integration. Just like competition, Universal Service Protection is a European-wide principle, whose goal it is to protect the weakest consumers as citizens from inevitably arising market failures (notably due to cream-skimming and cherry-picking by firms). European consumers as citizens have to be protected regardless of their geographical location in matters of accessibility to a minimum set of services, affordability and quality. The national regulators are charged, by the EC, to enforce this European Universal Service in the different sectors at the national level. This top-down approach to consumer protection is fundamentally different from the bottom-up approach practiced in the United States by the different Utilities Regulatory Commissions.

What are the challenges of the European approach?

This European approach creates of course a series of challenges. After discussing the two main general challenges, I will focus the particular challenges related to consumer protection. The general challenges to this European approach are, not astonishingly, political in nature and can be observed across all the infrastructure sectors. Let us mention first the national sovereignty challenge: unbundling of former national monopolies, integration national infrastructures into European ones and setting up regulators that report directly to the EC, not to mention the creation of European regulators, all infringe on national sovereignty and, as such, not astonishingly, are creating some tensions with the different member states. While European legislation, backed by subsequent infringement procedures, is pushing forward, member states are often holding back leading to always coherent approach across the different infrastructure sectors.

In addition, there is also a challenge of legitimacy of EC action. While the EC is often accused of being technocratic, such a critique is even more appropriate in the case of (independent) national regulatory bodies and European-wide regulators. This legitimacy problem is bound to become even more exacerbated in the future, as regulation and regulatory Europe further expands. One, if not the only way, for the Commission to address this challenge and stem the corresponding critique may well be an increased focus on consumer protection and consumer rights more generally, understand as rights of European citizen-consumers in light of an increasingly integrated market.

Since its very origin, consumer protection in Europe is conceived as an answer to liberalization (and not, as is the case in the United States, as a remnant of liberalization). As such, consumer protection responds to the challenges posed by the creation of a single European market (in the infrastructures and elsewhere) to the (national) public services the citizens (in some of the member states) were accustomed (and entitled) to. As the European (infrastructure) markets progress and integrate, industry concentration also advances, leading to a diminishing number of infrastructure service providers in all the sectors. For example, in the air transport sector, Europe (and the world) is now down to three major alliances (all dominated by European companies), with a similar evolution the telecommunications industry (e.g., T-Telecom, Orange, Vodaphone). Analogous evolutions can be observed in the railway sector (dominant role of Deutsche Bahn), the electricity sector (dominant role of Electricité de France), and in the postal sector (dominant role of Deutsche Post DHL). This evolution poses problems not just for the weakest European consumer-citizens, but also for most of consumers and citizens of the smaller and the more peripheral European member states. And this even more so because many of these now dominant infrastructure firms have remained so-called “national champions”, i.e., maintain strong ties with their respective governments. In short, one of the only legitimate options for the EC may well be the strengthening of European-wide consumer protection by way of its already initiated top-down and regulatory approach.

Consumer Advocacy in Australian Regulatory Decision Making - 'Hard Choices Await'

Greg Houston*

A sustained period of cumulative price rises in the order of 50 to 100 per cent for energy delivered to final consumers¹ in Australia has brought consumer sentiment towards policy makers, economic regulators and energy supply companies to new lows. This phenomenon has given rise to an upsurge of interest in strengthening the level of consumer engagement in the regulatory price determination process. The Australian Energy Regulator has established a Consumer Challenge Panel with the purpose of giving explicit consideration to the interests of consumers during its price determination processes. At the policymaker level, the Standing Council on Energy and Resources – representing all governments in the federation on energy matters – has agreed in principle² to establish a national energy consumer advocacy body. This paper explores the nature and extent of the 'gap' in the institutional and regulatory framework governing the Australian energy sector that a consumer advocacy function needs to fill, and draws attention to the potential challenges in discharging that function effectively.

The current regulatory arrangements for Australia's infrastructure sector stem from comprehensive reforms undertaken in the mid-1990s. At that time, electricity and gas was predominantly supplied by means of state government-owned network infrastructure, in combination with government mandated or controlled monopolies in electricity generation and upstream gas. Under the national competition policy reforms agreed in 1995,³ all governments committed to the structural reform of publicly owned monopolies, through:

- separation of the natural monopoly functions from those that could be opened to competition; and
- the establishment of:

- independent regulation or 'prices oversight' of natural monopoly, network business enterprises; and
- a national access regime⁴ governing services provided by nationally significant facilities, thereby facilitating competition in markets either upstream or downstream of the facility.

A defining principle⁵ of the framework for the access to essential infrastructure element of the reforms was that, as far as possible:

- access prices were to be established by commercial negotiation between an infrastructure service provider and its users; but that
- if negotiations were not able to deliver a satisfactory outcome, access seekers should have recourse to an arbitration process, under which access terms and conditions would be determined by a regulatory body or its equivalent.

Under the 'negotiate-arbitrate' principle that underpinned the national access regime, arbitrated or regulated prices were seen as a 'last resort', to be invoked only when commercial negotiations between the parties had failed.

In infrastructure sectors such as airports, rail lines and ports, negotiation between the service provider and users has indeed become the *modus operandi* for determining the terms and conditions for access. Although arbitration processes have in some instances been required to settle access pricing disputes, the framework has been characterised by a high degree of user participation in 4 The national access regime was introduced by way of addition to Australia's principal competition law, the then Trade Practices Act 1974. Part IIIA of the Act established three alternative processes by which a person could gain access to services provided by essential facilities, being: 'declaration' of a service following application by an access seeker; a voluntary 'undertaking' approved by the Australia Competition and Consumer Commission; or the 'certification' as effective of an access regime developed by a relevant state-based government or service provider.

5 Hilmer, F, Rayner, M and Taperell, G, National Competition Policy, Report by the independent committee of inquiry, August 1993

1 In this paper, I use the term 'consumer' to mean the final users of products and services. Much of the written material on this subject uses the terms 'consumer' and 'customer' without any apparent distinction and, for the purposes of this paper, I take the term 'customer' to have the same economic meaning as 'consumer'

2 Standing Committee on Energy and Resources, Meeting Communique, Brisbane, 31 May 2013

3 See: <http://www.coag.gov.au/node/52>, accessed 18 March 2014

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what – in other jurisdictions – might otherwise require a periodic regulatory determination.

But in each of these sectors, access seekers are not the ultimate or end consumers of the relevant service. Rather, the party negotiating access terms and conditions are ‘intermediate’ users: airlines rather than travellers; rail haulage providers rather than those wishing to move freight; and coal, mineral or wheat exporters rather than the users of bulk commodities. The principal economic characteristics of the users participating under these negotiate-arbitrate arrangements are that they:

- are relatively few in number – such as the airline users of airport infrastructure;
- have a significant financial stake in the outcome of price negotiations since, although the relevant end markets are typified by effective competition, they are often dynamic, in that they involve a high degree of product differentiation and have no legacy of end market price control; and
- can be presumed to be putting the resources expended in access price negotiations to work in a manner that is consistent with the interests of final consumers, ie, more intense competition, delivering better services and/or lower prices.

The consequence of these characteristics is that the users of the relevant infrastructure services (ie, the access seekers) have both the incentive and ability to negotiate access terms that are consistent with the long term interest of end users, even though those end users are generally not involved in the process. In these infrastructure sectors, little if any consideration was given at the time of Australia’s mid-1990s competition reforms to the question of whether or how final consumers would participate in the process of determining access prices.

By contrast, arrangements for the regulation of access prices in Australia’s energy network sector have evolved quite differently. The economic regulation of these services has developed in the form of arrangements for the standing, periodic determination of network charges by a national economic regulatory body. Reinforcing the contrast is that, despite the ubiquitous presence of intermediaries users who acquire network services to deliver an energy supply to final consumers, hitherto, these intermediaries (or ‘energy retailers’) have barely participated in the network tariff determination process.

The absence of meaningful engagement in the regulatory process by the direct users of network services remains a puzzle. One explanation may be the history of price controls applying to the end service and, with that, a prevailing norm that changes in the prices applying for the network component feed immediately through to retail energy tariffs. However, even as price controls on retail energy supply arrangements are increasingly rolled back, retail energy suppliers in Australia continue to show

very limited interest in the network tariff review and determination process.

This is not to say that the interests of consumers in the regulatory review and determination of energy network tariffs are ignored. But some important distinctions have significantly affected their role. The processes and procedures adopted by most regulatory bodies in Australia generally do not have any prescribed role for consumer input to its deliberations, other than by means of the standing ability for any party to make a submission in relation to any regulatory proposal.

Of course, individual consumers will rarely have the incentive or the ability to invest time in providing meaningful input to the often complex questions that arise in a typical, network tariff re-determination process. Rather, like most developed countries, a wide range of consumer representative organisations exists throughout Australia, each of whom has the potential to engage with regulators and service providers on service level and pricing matters. However, engagement in regulatory processes is rarely the *raison d’être* of these organisations; rather, such functions are typically a ‘sideline’.

Australia’s existing consumer representative bodies typically also do not have as their purpose the representation of the interests of consumers as a whole. More likely, their mission is to advocate the interests of a particular consumer segment, such as the socially or financially vulnerable, or large industrial users. Aside from representatives of a relatively small number of major energy users, such groups tend also to be fragmented and poorly resourced.

Compounding the limited ability for consumers to provide effectively for their own representation before Australia’s regulatory bodies, the institutional role of regulators themselves is not to stand in the shoes of and/or to advocate for the interests of consumers in particular. Rather, Australian regulators are subject to the strictures of sound administrative decision-making,⁶ which require them to reach decisions through a process of reasoning that has regard to relevant considerations, and does not have regard to irrelevant considerations.

The consequence of these arrangements is that, in Australia, the implied role of regulators reflects that of an independent decision-maker, weighing the representations and evidence of separate interest groups, being service providers and consumers.

Over time, it has become increasingly recognised that the legitimacy of this regulatory function may be compromised if there is insufficient ability for the interests of consumers to be properly represented and advocated in

⁶ See, for example: Administrative Decisions (Judicial Review) Act 1977

the processes applying to energy networks in particular. For almost a decade, the apparent existence of an institutional ‘gap’ has received increasing attention,⁷ particularly as regulatory decisions have become more complex and as energy prices have increased substantially in real terms.

Importantly, the nature of the institutional deficiency that has been identified does not arise from inappropriate specification of the objectives of Australian regulatory decision-makers, which focus on achieving efficiency in the provision of services for the long term benefit of consumers. No commentator has suggested that such an overarching objective should be modified to tilt the balance, say, toward the near term interests of consumers.

Rather, the institutional challenge arises from a procedural imbalance in the nature and extent of the representations being put before regulatory decision-makers. Contributions from a relatively small number of well-resourced service providers are extensive, coordinated and weighed by expert opinion. Juxtaposed against this, consumer input is limited, often lacking technical expertise, and typically represents sectional interests – such as major energy users or consumers who may be vulnerable or have special needs – rather than ‘average’ consumers.

These deficiencies were recognised in a 2013 report prepared for the inter-governmental Standing Committee on Energy and Resources (the Tamberlyn report),⁸ which recommended the establishment in Australia of a national energy consumer advocacy body. That recommendation has been accepted in principle by Australia’s energy ministers,⁹ but is still to be implemented.

The Tamberlyn report recommends that such a body would require an annual budget of AUD\$6.2 million, including the remuneration of 14 staff. Its proposed objective would be:

“To promote the interests of all Australian energy consumers over the long term, with respect to their access to the supply of efficiently priced, reliable and safe energy services, by presenting a strong, coordinated consumer advocacy voice no national energy market matters of strategic importance and material consequence for all energy consumers and particularly household and small business energy consumers.”¹⁰

7 See, for example: KPMG, Review of Consumer Advocacy Requirements – Report for User Participation Working Group, Ministerial Council on Energy, 2005; and G Owen, The potential role of Consumer Challenge in energy network regulation in Australia: a think piece for the Australia Energy Regulator, 13 March 2012.

8 Tamberlyn, J, and Ryan J, Proposal for a National Energy Consumer Advocacy Body, 30 April 2013

9 Standing Committee on Energy and Resources, Meeting Communique, Brisbane, 31 May 2013

10 Tamberlyn, J, and Ryan J, Proposal for a National Energy Consumer Advocacy Body, 30 April 2013, page 1

On the functions of such a body, the energy ministers commissioning the report suggested it should seek:¹¹

- to participate in a meaningful way in regulatory activities, including revenue determinations, rule changes, etc;
- to provide a consumer advocacy service that recognises the distinct market differences between jurisdictions;
- to disseminate information and tools to consumers, and consumer representative organisations;
- to undertake research to support evidence-based policy development; and
- to build capacity to advance the interest of the average Australia residential and SME energy consumers.

Few would disagree that these are worthy objectives and functions on which to focus. However, the inevitability of the constraints applying to the resources that such an institution will have at its disposal mean that it is important to consider what ‘success’ in such an advocacy role may look like, and how such a body would set the ‘right’ priorities for its advocacy efforts.

In concept, successful consumer advocacy can be defined in various ways. For example, some may hold the view that securing material changes in regulatory outcomes (perhaps, lower prices or better service levels) should be the principal yardstick. Of course, success defined in this way implies that the regulatory body to whom consumer-focused representations are made will take different decisions in light of different or better, consumer advocacy.

Alternatively, some may gauge success to have been achieved if regulatory processes are more transparent and accountable, even if the outcomes remain largely unchanged. Success of this form would be consistent with achieving increased legitimacy for regulatory decisions – even though they may be the same as before, the degree of acceptance will have been enhanced.

A further potential form of successful advocacy might be consumers who are better informed – again, even if the substantive outcomes remain essentially unchanged. These latter two forms of success are both more consistent with the ‘legitimacy’ gap that guided the original motivation for the establishment of improved consumer advocacy arrangements.

In any case, each different potential form of success will require difficult resource allocation decisions to be made by those setting the organisational priorities for a national consumer advocacy body. At a yet more practical level, with limited internal and/or external resources at its disposal, such a consumer body would need to identify

11 Tamberlyn, J, and Ryan J, Proposal for a National Energy Consumer Advocacy Body, 30 April 2013, page 70

particular items from the typical regulatory ‘menu’ that should receive its attention. For example, a CPI-X price determination process can typically be separated into matters that affect the average price level and those that affect tariff structure outcomes. A decision to focus on the former would in turn necessitate giving more or less weight to matters such as:

- the service or reliability standards to be adopted;
- or
- the reasonableness of expenditure allowances, given choices as to service standards; or
 - the reasonableness of the rate of return to be adopted.

The advantage of these choices is that any tangible successes – lower prices and/or better service – are likely to be realised for most or all consumers.

On the other hand, a decision to focus on tariff structure-related matters may also be capable of achieving significant gains, say through refinements to decisions in relation to the roll out of smart meters, the development of time-of-use tariffs, or in the balance between fixed and variable elements of network tariffs. Such topics often receive relatively less attention than headline elements of regulatory decisions, such as the rate of return. However, many tariff structure questions involve changing the incidence of revenue recovery between one type of consumer and another, and so it is easy to see a body

tasked with representing all consumers finding it difficult to reach a position to advocate for matters that may not be accepted by most all of its constituent group.

Finally, some will inevitably call for such a body to devote a significant proportion of its effort to engaging in relation to ‘big ticket’ regulatory items, such as the appropriate rate of return. However, this presents the challenge that while the potential gains for consumers may be significant, they are likely to be hard won, and expensively so. Given their quantitative significance for price level outcomes, both service providers and regulators typically already devote significant resources to such elements of the regulatory process. Once that reality is taken into account, a realistic conclusion may be that a consumer advocacy body will rarely if ever enjoy sufficient resources to make a significant difference on these elements.

The establishment of formal, consumer advocacy roles should be capable of bringing improvement in the price, service level and tariff structure outcomes of regulatory processes, as well as in consumer education and understanding. Such improvements have significant potential to enhance the legitimacy of regulatory outcomes. However, in moving to implement such a worthwhile reform, careful attention will need to be given to the hard choices that consumer advocates will face in how best to deploy their limited resources.



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The Transport Area of the Florence School of Regulation

The Florence School of Regulation (FSR) has been created in 2004 as a partnership between the European University Institute (EUI) and the Council of the European Energy Regulators (CEER). Since, the Florence School of Regulation has expanded to Telecommunications and Media (2009) and Transport (2010). It will further expand in 2014 into Water and Finance and Banking.

The Transport Area of the Florence School of Regulation (FSR Transport) is concerned with the regulation of all the transport modes and transport markets (including the relationship among them), and currently focuses on regulation and regulatory policies in railways, air transport, urban public transport, intermodal transport, as well as postal and delivery services.

The aim of FSR Transport is:

- to freely discuss topics of concern to regulated firms, regulators and the European Commission by way of stakeholder workshops;
- to involve all the relevant stakeholders in such discussions; and
- to actively contribute to the evolution of European regulatory policy by way of research.

The core activity of FSR Transport is the organization of policy events, where representatives of the European Commission, regulatory authorities, operators, other stakeholders, as well as academics in the field meet to shape regulatory policy in matters of European transport.

The results of FSR Transport activities are disseminated by way of policy briefs, working papers and academic publications. All FSR Transport materials are open source and available on the FSR Transport webpage, as they aim to involve professors, young academics and practitioners to become part of a unique open platform for applied research. To learn more visit our website: www.florence-school.eu or contact us at FSR.Transport@eui.eu.

FSR-T: Forthcoming Events 2014

Title	Date
3 March 2014	2nd Florence Intermodal Forum - High-Speed Rail vs. Low-Cost Air: competing or complementary modes?
24 March 2014	5th Florence Air Forum - Markets in Air Traffic Control and the evolving role of Eurocontrol
28 April 2014	8th Florence Rail Forum - Rail Infrastructure and Rolling Stock: investments, asset renewal and regulation
7-9 May 2014	(in collaboration with EPOMM) 18th European Conference on Mobility Management: Creating the bridge to a green fair and prosperous mobility future.
13 June 2014	3rd Conference on the Regulation of Infrastructure Industries

For more information on our activities please contact:

Communications & Media	FSR.ComsMedia@eui.eu
Transport	FSR.Transport@eui.eu
Energy	FSR@eui.eu

Call for papers

Competition and Regulation in Network Industries

7 November 2014
Brussels, Belgium

7th annual conference of the multidisciplinary journal
Competition and Regulation in Network Industries

Residence Palace, Rue de la Loi 155

Network industries are caught between competition and regulation. To perform adequately, vital infrastructures (such as energy, water, telecom, post, railways, aviation, and transport) need to carefully balance private interests and public values, economic efficiency considerations with social service obligations, and pressures for further liberalization with the need to regulate monopolistic networks. At the same time significant innovations – notably in the field of ICT – are taking place that offer new opportunities and impediments for infrastructure operations and governance. Exploring this balance between competition and regulation in network industries provides a fascinating field of research that challenges politics and business alike.

The conference takes a multi-disciplinary approach and explores the legal, economic, institutional and public policy aspects of network industries. It aims to highlight dominant current trends and issues affecting network industries through parallel sessions, including but not restricted to:

- Challenges in Network Industry Regulation
- Liberalization Models in Network Industries
- Measuring Network Performance
- Inter/supra-nationalization of Infrastructures
- Investments and Innovation in Network Industries
- Sector-specific issues (Electricity, Gas, Railways, Telecom, Post, Water, Aviation, Transport, Internet, ...)

Keynotes

In addition to the parallel sessions, the conference will feature two keynote speeches by leading academics and/or practitioners in the fields of competition, regulation, and network industries.

With this call for papers the CRNI invites you to contribute to the conference through papers and panel suggestions.

Guidelines

Please send a 600 to 1000 word proposal in a word document by 2 June 2014 to a.g.cruzvelis@tudelft.nl. The proposals will be refereed by the editorial board of the CRNI. The proposal should include:

- Title of the paper and a few keywords
- Name and full address of the (corresponding) author(s)
- The aim and methodology of the study
- Results obtained or expected

Important dates

Deadline for panel submission: 16 May 2014

Deadline for paper proposals: 2 June 2014

Notification of acceptance: 4 July 2014

Final paper submission: 15 October 2014

Fees

Members of academic / non-profit institutions: 200 Euro

Members of business community: 300 Euro

PhD students: fee waivers are available upon request

Further details

For further information about the conference, registration, submission, and program, please visit: www.crninet.com.

Organizing Committee

Matthias Finger (EPFL), Editor-in-Chief

Rolf Künneke (TU Delft), Editor-in-Chief

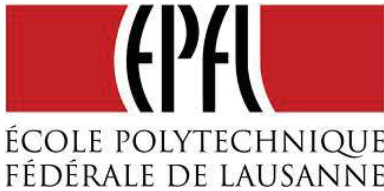
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ANNOUNCEMENTS



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Chair Management of Network Industries - MIR

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 - how governance relates to such urban performance
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questions?

Please feel free to send us and email (iglus@epfl.ch).

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