

5th Annual Regulatory Evolution Summit - Conferenz
Consumer view of regulation and consumer-orientated regulation



Stephen Franks – 31 March 2011

A consumer perspective of merit review so far - and
crusading without cost:benefit analysis

Problems with Merit Review

- Intended
 - No ability for Court to correct imbalance of “*documentary information and views that were before the Commission when it made its determination*”
- Unintended
 - Imbalance of submissions
 - Lack of clarity on procedure
 - Forum shopping
 - Who can't appeal

Uncertainties about the record / process

- What is the record for each review?
 - Sharing across industries
 - Similar principles for each sector
 - The Commission's own views?
 - Remediating an evidence gap or imbalance
- Effect of lack of opportunity to rebut
- New expert views (disguised as argument) permitted?
- Capacity to argue matters not previously argued
- Judicial umpiring or own conclusions?

Worst case

- Court knowing that supplier evidence questionable but lacking evidence on the other side to rely on
- Inconsistencies between sectors created by separate process
- *Increased* uncertainty if lengthy review process
 - cf. Australia (target is three months)
- Asymmetric cost risks
 - cf. protection in Australia

Has it worked?

Too soon to tell but:

- Few incentives to minimise appeals
 - cf. United Kingdom where few appeals
 - One appeal body and multiple first-instance regulators
 - Willingness to lower permitted returns (high stakes game)
- One way bet for suppliers (from frozen record and swamping with arguments for higher returns).
 - Trade-off between gaming and the costs of further evidence at appeal.
 - Australian legislation
 - cf. "matters" rather than "documentary information and views "
 - New material can be introduced if not "unreasonably withheld"
 - Australian Energy Regulator can raise new matters (that relate to a ground for review) other parties restricted to matters raised in submissions.

How to fix

Without legislation

- Balancing participation by Treasury, RBNZ, Ministry of Consumer Affairs, etc.
 - MED consider this "inappropriate" given the independence of the Commission
- Sponsorship of consumer analysis and participation
- Cost or procedural ruling to achieve Australia levelling for consumers
- Specialist judges (for consistency/predictability across the regulated industries)
- If Court ordered methodology flawed the Commission could accelerate its review
 - Increased uncertainty

With changes to the law

- Court discretion for new evidence
- Right to intervene by consumer groups
 - Australian test (section 71L of National Electricity (South Australia) Act 1996):
if the Tribunal is satisfied—
 - (a) the user or consumer intervener, in its application for leave to intervene, raises a matter that will not be raised by the AER or the applicant; or*
 - (b) the information or material the user or consumer intervener wishes to present, or the submissions the user or consumer intervener wishes to make, in the review is likely to be better presented if submitted by the user or consumer intervener rather than another party to the review; or*
 - (c) the interests of the user or consumer intervener or its members are affected by the decision being reviewed.*

Analysis deficiency:

Consumer Guarantees Act changes

- Since 2003, consumers have a guarantee from:
 - retailers that electricity, as a “good”, will be of acceptable quality
 - lines companies will provide line “services” with reasonable skill and care
- Ministry of Consumer Affairs see problem:
 - retailers liable but have no control of quality
- Ministry of Consumer Affairs propose:
 - Lines companies to give acceptable quality guarantees for electricity and gas
 - Retailers to be indemnified by lines companies

Analysis deficiency:

Consumer Guarantees Act changes

- Problems with MCA proposal
 - Does not address inefficiencies of “defect statement” contracting out
 - Uncertainty of “acceptable quality”
 - Double ‘insurance’ (multiple parties insuring same risk)
 - Gold plating at consumer cost
 - No obvious economic analysis by MCA (e.g. Transpower fear costs)
 - Not recognised as risk allocation : MCA intuitive crusaders?
 - Freeze the industry (statute rather than delegated legislation such as Code)
- Better solution:
 - Consumers (and their insurers) get clear rules on who carries what risk
 - Industry knows who pays (at least cost)