ACCC/AER Regulatory Conference

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Inherent Limits on Regulatory Excellence – What we don't talk about[1]

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Introduction

Thank you for the opportunity to speak at the conference.

The basic proposition of my remarks today is that, unlike competitive market theory, economic regulation does not acknowledge factors that work against regulators doing a good job.

If you pick up any respected regulatory text you find at best a limited, incomplete and I would say out of date consideration of regulatory failure. If you review regulatory impact policies, they don't explicitly consider the question of whether the regulator itself will do a good job – it appears to be assumed.[i]

I have for some time found this very odd, given the field of regulation is based on an extensive consideration of the conditions leading to market failure. It is as if, having identified a market failure condition, we give the task to the regulator and we just assume that regulators will do a good job. But do we really have a good reason to think that?

My comments focus on economic regulators, such as the ACCC and AER, reflecting the conference focus and my personal experience. That is, regulators in a broad sense, who regulate directly or indirectly the conditions of production and supply of goods and services, not just network regulators.

My comments draw on experience over 27 years working within regulators, as an advisor to regulators and acting for private and publicly firms who engage with regulators. As a rough guide, my experience is roughly about half on the regulator side, and half on the regulated business side.

My recent experience is weighted to the regulated side. There is a tendency for people in my position to be a regulator critic, particularly where it doesn't go your way, and to miss the bigger picture.

The focus of remarks today is not on particular decisions (although I will use a couple of examples), but a longer term perspective of regulatory performance. I have tried to think about conditions that work against regulators doing an excellent job from the broader public policy objectives of economic regulation. I am sure I won't be able to completely shed a natural tendency to be a critic, and much of what I say reflects my own experience in working in a regulator. Let me offer an upfront apology when that element creeps in.

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1 Paper prepared as remarks for the session: *What does it mean for a regulator to succeed*? The delivered remarks are an abridged version of this paper.

2 Partner and head of the Competition and Regulation Practice, Gilbert + Tobin Lawyers. I have benefited from, and greatly appreciate, discussing this topic with a number of people and receiving comments on a draft of this paper. I remain responsible for the contents.

What has puzzled me for a long time, including when I was in government, is not that regulators aren't perfect and from time to time may get some things wrong, be inefficient, or not adopt good processes, but that there appear to be inherent limits to regulators doing the job well and that is generally overlooked and doesn't get much attention.

Now that sounds odd, when I am talking at a leading regulatory conference that is put on by regulators to engender debate around regulatory issues and performance and in particular when I am on a session that is shining a light on the question of regulatory excellence.

I don't say that economic regulators are not keenly focussed on improving their performance and promoting consumer interests. What I do say is that if we want excellent regulators, then we need a clear eyed understanding of the factors that can lead regulators to underperform.

The goal of regulation and a checklist for regulatory excellence

The promotion of the long term interests of consumers (particularly through efficient production, investment and use of resources) is a good short hand proxy for the goal of economic regulation.

Overall Australian economic regulators can generally be considered to be doing a good job (even perhaps a very good job). They demonstrate many of the behaviours of an excellent regulator (e.g. Coglianese RegX model[ii]); are actively engaged in developing regulatory performance frameworks[iii]; and are widely respected by consumers, business, media, politicians and courts.

While those attending this conference come from many different professional contexts, what is common to all of us is that we are consumers. From a consumer perspective, I am sure you would agree that we don't want low morale, timid and lazy regulators. We are fortunate that our regulators do appear to be high morale organisations, actively engaged and prepared to take on hard issues.

Consumer confidence in regulators supports the operation of the free market economy and mitigates the risk of worse regulatory or political outcomes (i.e. direct market interventions).[iv] Our economic regulators have shown strong public leadership over a long period of time and from the perspective of consumer confidence I think they are certainly doing a good job.

My checklist of the things that an excellent regulator should do is the following:

- identify and allocate resources to the right priorities;
- use resources efficiently and look to improve over time;
- be open to innovation and try different ways of doing things;
- invest in deep competence and be open minded and receptive to all evidence;
- make high quality decisions (both correct and robust) and learn from mistakes;
- ensure short term actions are directed to achieving the right long term outcomes;
- make sure to advocate about and for the right things;

- build and sustain: broad consumer stakeholder support; acceptance and respect of regulated stakeholders (balancing preparedness to take tough action, with openness, consultation, good processes and lack of arbitrariness); the respect of the courts as a competent agency and ethical agency (ethical in the sense of operating within the legal principles governing administrative actions).

If a regulator can do those things, they should also gain the respect of political institutions.

There are well developed theories or principles that can be applied to the role of regulators to underpin the environment and conditions for effective regulatory action. One excellent model is the public value theory developed by Mark Moore[v], and the application of the concepts of creating value in an explicitly regulatory context[vi], which I will return to. These models have been developed and disseminated through excellent programs at public policy schools in Australia and around the world.[vii]

There is increasing focus on regulatory performance evaluation. A lot of work is going into the development of regulatory performance frameworks and measures globally, including the Commonwealth Regulator Performance Framework, as part of its Cutting the Red Tape program.[viii]

While I will come back to what I see as some of the limits on these performance frameworks, they are clearly valuable developments for our regulators and very important aids for regulators committed to improving their performance and effectiveness over time.

In short, it is clear to me that our regulators actively engage around how to do their job better – this conference being a good example.

What I would like to raise is a missing, but I think important, consideration in the discussion on regulatory performance and excellence – that is well known and inherent limits on administrative decision making. From my observation, these are largely ignored in the case of regulators.

I start from the basic observation that simply because a regulator demonstrates the attributes of an excellent regulator, doesn't guarantee that a regulator will be successful in doing an excellent job in promoting long term consumer interests. Further, while performance evaluation frameworks and measures are essential, we should question whether they have the capacity alone to drive regulators to do an excellent job and achieve excellent outcomes.

Why do we have regulators?

To think about what makes a regulator successful we need to back up and think about why we have them in the first place. Everyone here will be familiar with the standard public policy model that underpins regulation, namely the identification of some market failure, where the role of regulation is to address or correct that market failure. The correction is intended to move us closer to the economic paradigm of efficiency, which we accept is in the long term interests of consumers.

I would like to take a further step back.

Government has a fundamental role in promoting the common welfare[ix] of its citizens (and we can use consumers as a proxy in this context). That is the basis for our belief in beneficial government

involvement in markets. The question is what role should government take in markets, that is in the allocation and use of resources, including the production and supply (and conditions of supply) of goods and services? In particular:

- why should government be directly involved in markets at all?
- alternatively why not leave it to government to do it all?

We have a very powerful answer to this question: competitive free markets, in which individuals are free to choose what to produce and to consume best meet society's needs and thus promote the common welfare of society. We have a well-developed longstanding robust theory that competitive markets deliver socially beneficial outcomes. This is why we promote a market economy. The corollary is that central determination of the conditions of production and supply in general do not promote the long term interests of consumers.

We also have a well-developed theory of market failure (externalities, information asymmetry, public goods, market power) and the limits of market theory (e.g. equity and distribution). In these cases we don't assume that the market produces the best outcome and this is why under the standard public policy model governments have a beneficial role and, in the case of market failure, set up regulators.

Do we have any basis for believing regulators will do a good job?

Do we have an equivalent theory of regulatory success and failure?

Unlike the strong theoretical rationale that supports individual choice in competitive markets, governments regulate despite a strong basis for concluding regulators will do the job well.

This is a public policy paradox; we regulate markets not because we believe government is best, in fact we think the opposite; we believe markets are best for consumers, but we know they don't always work. We actually believe government is not very good at all.

We rely on regulators to correct for market failure conditions to facilitate the market working or deliver a proxy for competitive market outcomes. Yet we don't trust central decision making to be very good.

Notwithstanding the lack of a clear basis to believe regulators will do a good job, governments[x] give them a very large role in the economy. More and more we seem to just accept as normal or business as usual regulatory intervention in markets.

For example, the Commonwealth Government has given the ACCC a shadow pricing role over mortgage products, which the ACCC expects to impact the extent to which major banks pass through the financial transactions levy.[xi] There are pervasive examples across regulated industries where regulators have been given roles to involve themselves at all levels of business decision making. The ACCC has a much broader impact than simply a traditional prosecution enforcement function and undertakes quite micro and nuanced direct interventions into competitive market behaviour.[xii]

I am not saying that regulators shouldn't be given these roles. As a consumer I can see the clear case for regulators and I want them to do a good job in my interests.

So what does theory tell us as to how regulators will do their job?

If you pick up a regulatory text you will not find any theory that regulators will inherently strive, or indeed are capable, to maximise community welfare. There is no theory that regulators will be omniscient, altruistic and unbiased decision makers. You may find some discussion, I would say largely out of date and certainly incomplete, about regulatory capture.

What you won't find is a general discussion of regulatory failure. This is very odd, given that there is a broad literature about the reliability and quality of administrative decision making performance. Those contributions tell us that decision makers:

- are subject to profound informational decision making constraints; [xiii]
- as agents, have and act on their own (often short term) interests which are not necessarily or completely aligned with the interests of those on whose behalf they are acting (principals);[xiv]
- are prone to pervasive decision making biases.[xv]

What you don't find is a consideration of these factors as they apply to economic regulators.[xvi]

I think of these three factors (bounded rationality within administrative agencies, principal/agency effects and inherent decision making biases) as "inherent limits" on regulatory performance. They are akin to market failure conditions and could also be considered regulatory failure conditions. They are pervasive and will affect all regulators, as opposed to external factors, such as capture, rent seeking and political intervention, which are more likely to be case specific.[xvii]

These limits on regulatory performance don't arise (or to the same degree)[xviii] in competitive markets. We generally accept people acting in their own self-interest will produce the best societal outcome. The theory doesn't deny self-interest, but requires self-interest to work. Individual firms do not have to make good individual decisions. Inferior firms are disciplined or constrained by superior firms over time. Not everyone has to get it right for the market to work.

How does this impact on regulatory decision making and performance?

My experience is that people working in regulators are generally highly committed to the public policy goals of the agency. But that is not a reason to ignore that they have their own interests and decision making limitations. Personal interests and biases do not fundamentally undermine our support for competitive markets, but they can be real issues when we delegate market decisions to a regulator.

Unlike in a competitive market, individual regulatory decision making errors are at best weakly constrained by the actions of others. Regulatory performance (which is much broader than just regulatory decisions) is not closely constrained in any relevant sense.

There are also relatively weak constraints on short term decision making. Competitive markets do provide pervasive (if imperfect) constraints against short term decision making in favour of long term

value creation, whereas regulators appear to lack clear long term incentives and are arguably rewarded for short term decisions.[xix]

An important feature of competitive markets is that they don't just constrain individual actors, but also provide very important feedback loops. If your product is not selling, that suggests you may have the wrong product. Or it may be that your product is inferior to others. If you are losing money, maybe you are inefficient. Feedback loops allow you to change decisions and to improve. Regulators have limited equivalent signals.

To some extent individual regulatory decisions can be contested through the courts and review tribunals, or through the media. The testing of individual decisions can operate as a form of feedback loop. However, it is incomplete and imperfect and there is scope for regulators to ignore unwelcome feedback. A firm in a competitive market simply has no leeway to ignore feedback that it is wrong.

The outcome of particular cases is also imperfect feedback. A regulator who wins all their cases is not necessarily doing a good job, and a regulator who loses cases is not necessarily doing a bad job. Likewise a regulator whose decisions are not challenged is not necessarily doing a good job.

Take one area that is very top of mind for competition lawyers – ACCC merger oppositions. Over the last 15 or so years, the ACCC has lost each of the contested challenges to a merger which has gone to a final court or tribunal decision.[xx] These cases are the most contentious and difficult cases and represent less than 0.1% of merger cases the ACCC has reviewed. As a consumer, I would rather they lose a few cases, than win all of them or not take any. Either of these outcomes would indicate that they are not sufficiently diligent in tackling contentious cases.

Individual cases tell you little about how efficiently the regulator has used their resources or whether they have chosen the right cases to take or decisions to make in the first place. It is rare to be challenged for the decision you didn't make.

More generally, it should be unarguable that regulators are likely to be prone to the same pervasive decision making biases, such as, for example confirmation bias, that affect other administrative decision makers. Confirmation bias is the tendency to search for, interpret, and favour information in a way that confirms pre-existing beliefs or hypotheses. Under this bias, ideas are tested in a one-sided way, focusing on one possibility and ignoring alternatives.

Regulators, as with other administrative decision makers, may also be prone to over-confidence bias, where people are likely to subjectively overstate the prospect that their view is correct (and therefore be less open to receiving and assessing evidence that is contrary to their view).

There is the risk in regulatory design and regulatory behaviour to exacerbate these factors. For example, there is an almost irresistible imperative for regulators to adopt simple organising statements which synthesise the agency role for external consumption and motivate staff. There is also a natural human tendency to formulate informal rules that simplify the issue at hand and act as accepted wisdom. These mental short-cuts or rules of thumb are known as heuristics. As understandable and

natural as they are, these “call to action” statements and heuristics can misdirect the agency from its true goal, build a misstatement of its mission and may underpin other decision making biases.[xxi]

While pithy and focussed mission statements aid public communication and are consistent with a positive activist regulatory culture, they may also exacerbate inherent decision making biases.

Even mundane things like the methods and processes that regulators adopt for decision making can embed bias risks. For example, a standard technique is to conjecture a particular theory of harm and then test that theory against the evidence. This can play into bias in the way information is received and whether it is accepted or rejected. Having speculated a theory of harm, the tendency is to overweight evidence consistent with the theory and reject or test more sceptically evidence against that theory. A balanced approach would be to have two theories, one of harm and one of no harm, and then test which theory is more consistent with the evidence.

The AER’s ‘foundation model’ approach to estimating the return on equity is an example of a decision making framework that would appear to inherently be at risk of confirmation bias (not necessarily in the administrative law sense), in that the decision making method as a matter of design appears to inevitably marginalise certain sources of information and promote others.[xxii]

The adoption of heuristics can exacerbate the impacts of confirmation bias. Heuristics are addictive and, at the risk of being overly impertinent, the combination of heuristics and over confidence is likely to be stronger the more senior you are. Governments understandably look to appoint strong agency leaders who have a high degree of personal accountability in public and with politicians. There is a risk that their broad work scope and large case load means they are heavily time constrained. These factors could skew the internal approach to decision making, where a time poor confident decision maker may be more prone to formulate and apply heuristics and to rely on confirmatory evidence.

Allied to confirmation and over confidence biases is the risk that a decision maker adopts (perhaps unconsciously) an approach implicitly on the basis that the ends justify the means. This approach may have some legitimacy in ethical philosophy. It is never likely to be appropriate in the exercise of regulatory power and can exacerbate the impacts of other biases. Internal accepted wisdom can operate as a form of ends justify the means legitimisation, for example: “regulated businesses are cherry picking” could lead to a search for counter measures such as offsetting reductions.

Over-confidence in the correctness of a presumptive decision may also lead to back-solving to reach that decision. An example of back solving by a regulator was the use of the goal seek function in excel by the ACCC to determine Telstra’s initial fixed line network RAB when moving from TSLRIC to the building blocks model, which in a circular way was then used to derive final prices.[xxiii]

The challenges of pervasive behavioural decision making biases to rational or optimal decision making have been extensively researched in relation to decision making in, for example, public companies, criminal law enforcement and administrative law. The issues are likely to apply equally to regulators and yet there does not appear to be research in this area.

A risk that may be more specific to regulatory agencies arises from their exposure to political actions, which can influence their incentives. For a regulatory agency to be successful it must sustain the support of "its authorising environment", in the terms of the Mark Moore *Public Value Strategic Triangle*. The executive and legislative branches of Government are a key part of that authorising environment. This raises a challenge, whereby the regulatory agency may be under implicit pressure, and have incentives, to take actions aligned with political interests (often short term interests).

It seems inherently difficult to untangle that element of maintaining authorising environment support which is consistent with meeting the regulatory objectives (e.g. promote the long term interests of consumers) and maintaining authorising environment support which is not.

Is it possible that regulators may actually act against long term consumer interests?

Many of the specific examples I have in mind (I have noted a few and will come back to a couple) are examples where a regulator is doing a good job, but could do a better job, and in that limited sense the regulator is not promoting consumer long term interests. However, I can think of some examples where it is arguable that the regulator may actually have acted contrary to consumer interests.

In the following three examples there is a question whether the regulators' short term interests were contrary to consumer long term interests. These examples are likely to be contentious and debated, but I raise them as food for thought.

- Firstly, P_0 or CPI-X regulation. This is no doubt a great regulatory innovation, particularly as it can provide incentives to regulated businesses to achieve (and thereby reveal) efficiencies, which can then be factored into subsequent regulatory decisions.

  While P_0 or CPI-X regulation is multi-period long term regulation, the question is whether regulators have short term incentives under P_0 regulation to find (and publicly promote) large scale price reductions on reset, particularly as this is likely to be the most visible and politically salient metric of performance? Do regulators promote and respond to the opportunities for headline one off price reductions? Does this have an impact on their resource allocation and pursuing the right priorities?

  For example, is it arguable that the AER underinvested in long term implementation of robust benchmarking[xxiv], and has over-invested in short term cost of capital issues (e.g. the various approaches over time to cost of debt estimates)? Has this been good for consumers or is it arguable that this delivered poorer long term outcomes for consumers? Is an apparently favourable (i.e. lower price) decision which is overturned on appeal (resulting in price volatility)[xxv] in consumer interests? While the regulator and others may point to the Tribunal review decision as an obvious culprit for a price increase, is it arguable that the action that was against consumer long term interests was a short term or poorly timed decision by the regulator to implement a benchmarking model that was not sufficiently robust and tested?

  Another example is how decisions on depreciation schedules are typically made. In any decision on a regulatory depreciation schedule, there will be some trade-off between short-term

and long-term considerations – for example, deferring depreciation will deliver lower prices in the short-term, but will leave more cost to be recovered in later periods. In these decisions, regulators appear invariably to opt for lower prices in the short term.

- My second example raises the question of whether regulators have incentives in relation to case selection and resolution such that they don't necessarily select for, and handle, cases in the best long term interests of consumers.

  As noted earlier, most attention on the enforcement record of the ACCC is when it loses a case. From a consumer perspective, provided the losses are not persistent and attributable to a lack of competence (which, given its generally good success rate, appears not to be the case), the fact the regulator loses cases at times is not in itself a problem and may even be a good thing.

  There may be issues even in the cases the regulator wins. Given the focus on court wins as a measure of enforcement agency success, the agency may have an incentive to obtain a court outcome, when a superior consumer solution could have been achieved in another way. Regulators may also potentially avoid hard or more risky cases that would be more beneficial to consumers in favour of easier cases. In this case, the easier cases will be both a drain on resource availability and may mask a failure to take on more important cases.

  From a consumer perspective the focus should also be on cases the regulator does not take or the ones they settle too readily. One interesting aspect of this issue arises from the recent concern expressed by the ACCC that that penalties imposed by Australian Courts in both competition and consumer cases historically have not been sufficiently high to deter contraventions, particularly in cases involving larger businesses.[xxvi]

  However, almost all cartel penalties (and many consumer penalties as well) over the last 20 years have been the result of a settlement by the ACCC in which it has submitted a penalty amount to the court, which the court has largely been bound to follow.

  If penalties are too low leading to under deterrence (and presumably higher levels of offending conduct), is this because of the regulator not the courts? Is it arguable that such settlements are short term decisions at the long term expense of consumers?

  I should note the ACCC is itself calling out this issue, indicating that it may be prepared to settle fewer cases, leaving the courts free to determine the penalty, in order to rebase penalty levels.

- My third example arises in relation to public advocacy by a regulator.[xxvii]

  I have two examples where I think it is open to debate whether the regulator's law reform advocacy was in the long term interests of consumers. In particular:

  - advocacy by the AER against limited merits review.[xxviii] The LMR framework provides an explicit basis for consumer group participation in reviews, as well as feedback for the regulator when it makes errors, both of which will be lost with the removal of LMR;

- advocacy by the ACCC for the Harper s 46 law reform proposal. In this regard, it is manifest that a strong push for the proposal was small business protection concerns. In fact, the Prime Minister explicitly cited protecting small business as the rationale for introducing the reforms.[xxix]

Are these law reform proposals in consumer interests? They are clearly in the agency's interests in the sense that each proposal expands their degrees of freedom to do what they think is best and they would appear to have been in the Government's political interests. But does it necessarily follow that they are in consumer long term interests?

In the case of s 46 reforms, while we can accept that it is the ACCC intention to only take cases involving exclusionary conduct (and it has released useful draft guidelines to that effect)[xxx], the mere passage of a law which is framed politically to protect small business seems inherently likely to create pressures and opportunities for investigations and actions (including private action in which the ACCC has no role) which could well be against consumer interests.

Suggestions on how to improve regulatory performance in the face of inherent limitations

The examples I have given are very open to debate and a discussion around particular regulatory decisions in real time can become very heated. The point of my remarks is not to debate particular decisions. While some may consider them to be poor illustrations, I am confident (perhaps over-confident) from my own experience that the issues I have raised are real.

So what to do about it? In a recent paper (published on April Fool's day 2014), Stephen Littlechild framed the following question and answer:

> Quis custodiet ipsos custodes: who regulates the regulators? The answer is: the Regulatory Conduct Authority (RCA).

In response, George Yarrow asked the inevitable question of who then regulates the RCA.

The short answer is that it is the principal responsibility of the Government to perform that role. And in this regard, it is clear that through the Cutting the Red Tape program and the Regulator Performance Framework the Commonwealth Government is taking steps to do so. Various (perhaps all) state and territory governments similarly have such best practice regulation programs.

But what you will not find in those programs, I would suggest, is any real attention to the issues raised in this paper. So I would think this is one important place to start. Government could be more explicit about these inherent limits on regulatory performance. If we are more explicit about them, then we at least have some ability to counteract them.

I would like to offer some other suggestions on how I think we could improve regulatory performance in the face of these inherent limiting conditions on regulatory performance.

From a regulator perspective, I think it is important to be open to and look for information on how you are performing (even, or in particular, critical feedback) and not be defensive.

Regulatory performance frameworks do have an important role to play. However, a regulator will naturally want to focus on outputs and how much work they are doing, and less on the efficiency and quality of the outputs. They may have no particular reason to focus on outcomes, which are hard to measure, particularly if no-one is monitoring outcomes. Outcome improvements are achieved over the long term and they may be hard to correlate to particular regulatory decisions.

No one will naturally design a stringent reporting measure to assess their performance, unless there is some outside force. A competitive market provides that force. There is no apparent equivalent for a regulator. As noted above, Governments could more clearly serve as a proxy in this regard, but they are yet to do this job well, and it may be questioned whether they ever will.

We should recognise that regulators have only weak incentives to design and report against the best performance measures and may have an incentive in promoting performance measures, such as the number of cases[xxxi] or regulatory actions or decisions taken, which put them in the best light but don't tell you whether they are achieving good outcomes.

The ACCC has developed its KPI performance framework, as required under the Government Cutting Red tape program. Without delving into a detailed critique in these remarks, I would say it reflects the general issues I have outlined. While it is certainly a valuable initiative, the ACCC KPI framework is (in line with the Government's 6 generic reporting framework KPIs) largely focused on internal inputs and processes, with some focus on outputs, not much attention to the efficiency of the relationship of inputs to outputs, or to measuring improvements over time. More fundamentally, there appears to be no consideration given to the very thing we are all interested in as consumers – specific outcomes that the law is set up to achieve.

I would suggest that the approach in those KPI's could be turned around:

- the framework could start by defining specific outcomes the regulation[xxxii] is seeking to achieve and identifying performance measures for those outcomes that can be tracked over time;
- outputs should be identified by the relationship of those outputs to achieving the specified outcomes, and they should be tracked over time. What we are really interested to see is whether the outputs are actually impacting on the outcomes;
- inputs should be identified by their relationship to specified outputs and be tracked over time. What we are interested in is the efficiency of achieving particular outcomes.

Approached in this way, we can track whether improvements in the desired outcomes are being achieved over time, whether the outputs are contributing to those improved outcomes, and whether resources are being used efficiently to deliver those outputs.

One very good initiative under the ACCC KPI framework is the use of business and other surveys and to be conducted over time. However, I would suggest that the scope of the business survey could be, and should be, more ambitious, as currently framed it does not endeavour to measure business

feedback against the specific goals of the Competition and Consumer Act (i.e., the outcomes the regulator is seeking to achieve) – and yet business is a key source of evidence on these outcomes.

We should also recognise that these reporting frameworks are high level and they are likely to provide mostly generalised feedback over time. What is also important is the type of specific feedback that tells you whether a regulator is doing good job in relation to the particular decisions they make.

An important source of this feedback is court and tribunal cases. My sense is that regulators are very defensive when they lose a case. That is understandable because they become so hotly disputed. However, a losing case can be a very important source of feedback. Insights can be gained by being open to a candidate theory that the loss was because I didn't do my job as well as I could have; I misread the evidence; I didn't assess it in a balanced way; I misunderstood the legal task etc. Given the resources that go into court and tribunal decisions, which can often dwarf the level of attention that the regulatory decision makers may themselves give to the particular issue, losing a case could be seen as a valuable tool to improve performance over time.

My observation, both from within and outside government, is that regulators find it hard to look objectively at why they lost a case. There can be a tendency to develop an alternative theory, which becomes internal accepted wisdom, which at its heart says that the regulator was right and the court or tribunal decision was in some way wrong.[xxxiii]

So I think regulators could get more out of losing cases as a source of feedback.[xxxiv]

As a regulator, you can also create your own feedback loops by being prepared to innovate and do things differently. How do you know whether you are using resources efficiently? How do you know if you have the right skills? Well one way you can test this is to conduct limited experiments by doing things differently (as a trial) and see if you get different results. Competitive firms are always adapting and improving because they get this feedback almost immediately.

How do you know whether your case selection or decisions are achieving the intended result? Well you should be able to find ways to get this feedback too, even simply through long term survey inputs.

As noted above, it should not be that difficult to identify the outcomes that are sought to be achieved and to adopt long term measures as to whether they are being achieved. For example, the ACCC has said that low penalties are leading to poor compliance outcomes. What is the evidence for that? It would be interesting to see what corporate executive views and behaviours are in relation to competition law compliance over time. This is the very thing that we want to influence through our competition laws and it can be directly measured. If you think penalties are too low to change behaviours, you should be able to test this over time.

An equivalent for regulatory decisions, would be to see the impact of regulatory decisions on long term price paths. If the focus was on long term (non-volatile) prices, then regulators may invest much less time and resources on one off regulatory decisions such as the debt averaging period or transition and much more time on things that are likely to promote the lowest prices over time.

Overall, regulators could be more mindful of, and explicit about, the inherent limits on regulatory performance, factors that might exacerbate or mitigate that, and build active internal strategies to address those conditions.

Being generally open to feedback, in the absence of market feedback loops, is essential. Openness to feedback is one of the core features of the RegX model and an express element of the Governments regulatory performance framework.

A habit of internal critique is also important – you don't need to just rely on feedback. This requires a degree of internal challenge that can be hard or unnatural. For example:

- When you say something is a matter of regulatory judgement – what do you mean? Do you mean that you want to be free to make your own mind up without being explicit about the particularly decision making criteria to be applied or how you have weighed the evidence?
- Is your accepted wisdom, or rule of thumb, a form of simplifying heuristic that is biasing the way you analyse the issue at hand?
- Do you balance and test information objectively and to the same degree, or do you favour some sources of information over another?
- Do you seek advice/information to support a prior view and to bolster a particular decision, or to genuinely inform you of what is the right decision?

I also think much more work could be done by regulatory academics in terms of making these issues explicit and identifying measures to counteract these inherent limits on regulatory performance. As noted earlier, this to me is a glaring gap in the regulatory literature. Academics could and should critically assess regulatory performance in light of these considerations.

As a general area of research, I think it would be important to take the behavioural research techniques in other areas and test for the risk of decision making bias and principal/agency effects. It would be interesting to study the attitudes and approach of people working within regulators. It would be useful to consider whether mission statements, and internal decision making procedures, may embed or counteract known biases. It would be useful to see if there are internal heuristics and accepted wisdom and how that impacts decisions. It would be interesting see how decision making is undertaken – is it top down or bottom up - and do the people who are influencing and determining outcomes have the right skills and time to make quality decisions.

There is a role for academics to mine the database of historical decisions. People are likely to be more objective and less defensive in relation to historical decisions. From my own experience, I think it would be interesting to get a behavioural science perspective on whether:

- there was some underlying behavioural decision making bias that affected the ACCC in relation to those admittedly few contested merger decisions it has lost over the past 15 years;

- the AER cost of equity foundation model approach is a robust framework for evaluating evidence or inherently prone to selection and confirmation bias.

I also think there is a role for external parties to support improvements in long term regulatory performance more strongly.

Business groups and others who are the direct subject of regulation are central stakeholders and have a strong incentive to improve long term regulatory performance; however they face challenges as an accepted third party challenger to regulatory performance. Business clearly has an interest in efficient investment and production and to that extent its interests are aligned with consumers – but they also have an interest in less constraint and greater pricing freedom, which may be aligned with or contrary to consumer interests (and efficient allocation and use of resources) particularly in the presence of substantial market power. I don't agree with regulators and others who simply dismiss business views as only self-interestedly against consumer interests. Nonetheless, business group views are likely to be easily rejected by a regulator as simply self-interested.

This is regrettable, because regulated businesses are an excellent source of feedback. A regulator could engender this source of feedback or could stifle it. Given that business is likely to be a multi-period interactor with the regulator, they are likely to be very sensitive to hostility from the regulator, as they will naturally anticipate that this could hurt them in subsequent interactions.

So a regulator may not even have to expressly dismiss business views, they may be very effective at conditioning whether business expresses negative feedback in the first place. Nobody in a competitive market would be able to successfully adopt this strategy.

This leads me to suggest that an important external source of pressure to achieve long term regulatory performance improvements should be consumer groups. In general (and subject to the risks of consumer group capture and themselves being victims of short termism), it is hard to call into question the motive of broadly representative consumer groups. Their interests are or should be (in simple terms) the interests regulation is seeking to promote. So self-interest and public interest align. Importantly, this will not hold true if consumer groups are themselves short-term focussed or have narrow political interests not aligned with consumer long term interests.[xxxv]

Overall, I think consumer groups could do a much better job in critically scrutinising regulatory performance against consumer long term interests. My sense is that consumer groups can be captured by the regulator and/or lack the resources to properly assess their performance over time.

Consumer groups should actively seek to understand how the regulator identifies priorities and how that translates into particular actions and outcomes over time. Ideally they would actively monitor this as a long term project. They need only ask a simple question: Is the regulator really doing as good a job as they could in consumers' long term interests?

Consumer groups should equally be interested in how resources are allocated and whether resources are efficiently used over time. An investigation of a marginal matter, or by deployment of excessive resources on one matter compared to others, means that other matters may not be pursued.

Here is an obvious area for consumer groups to be more actively involved and I would think there is a role for consumer groups to be actively and critically involved in the development and implementation of the regulatory KPI performance frameworks.

Consumer groups could also actively scrutinise regulatory calls for law reform and not just accept such proposals because the regulator has proposed them.

Involvement by regulators of consumer groups in regulatory processes and through consultation fora (as the AER, ACCC and state regulators do)[xxxvi] are positive steps. There is a question whether in practice this involvement is limited to particular decisions or issues or largely reactive to the regulator's agenda. If consumer groups are going to actively monitor regulator performance, they need to have a broader long term consumer interest mandate, they need resources (and Government and business may have an interest in assisting them in that regard) and they need to take a longer term perspective to performance evaluation.

Finally, I would suggest that government policy agencies should ensure they have their own deep understanding of the relevant issues. While the short term nature of political decisions is one important challenge, in the areas of policy and regulatory design, it is important not to become dependent on or captured by regulators, simply because they have a superior knowledge of the specific issues under regulation.

In conclusion, if I had to give my definition of an excellent regulator, it would be a regulator that:

- explicitly recognises the inherent paradox and challenge in its role; and
- actively looks for ways to improve its performance over time in face of the inherent limits on regulatory performance, and in particular the lack of strong constraints and feedback loops.

Thankyou

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[i] For example, The Commonwealth's *Regulatory Burden Measurement Framework,* https://www.pmc.gov.au/sites/default/files/publications/005_Regulatory_Burden_Measurement_Framework.pdf has an extensive list of regulatory cost considerations, but does not address anywhere the factors discussed in this paper which are generally well known and clearly can affect or limit the capacity of regulators to be successful in meeting the regulatory objectives.

[ii] *Achieving Regulatory Excellence* (Brookings, 2016)

[iii] For example: *Evaluating Infrastructure Reforms and Regulation: A Review of Methods*, Rob Albon Working paper No. 2 / August 2010 https://www.accc.gov.au/system/files/Working%20paper%20no.%202%20-%20Evaluating%20infrastructure%20reforms%20and%20regulation.pdf

ACCC self-assessment methodology, measures and evidence – Regulator Performance Framework June 2015, implemented as part of the Commonwealth *Regulator Performance Framework* that applies to all major Commonwealth regulators from 1 July 2015. https://www.accc.gov.au/system/files/ACCC%20self-assessment%20methodology%2C%20measures%20and%20evidence%20for%20the%20Regulator%20Performance%20Framework.pdf

[iv] This important point was recently made by ACCC Chair Rod Sims, *Ceteris Paribus, Competition is King*, 2017 Annual Conference of Economists, 21 July 2017: "*I see the ACCC as an advocate of competition and the market economy. Part of this is convincing the public of the benefits of competition. Markets should work in the favour of consumers. As we have seen, if markets do not work in the favour of consumers, or are not seen to do so, distrust in the market mechanism can*

grow and people are likely to agitate for other mechanisms to allocate resources." https://www.accc.gov.au/speech/ceteris-paribus-competition-is-king

[v] *Creating Public Value - Strategic Management in Government* (Harvard University Press, 1995)

[vi] See for example the work of Malcolm Sparrow of the Harvard Kennedy School focusing on a risk or harms based approach to regulatory enforcement, *The Regulatory Craft: Controlling Risks, Solving Problems, and Managing Compliance* (Brookings, 2000) and *The Character of Harms, Operational Challenges in Control* (Cambridge University Press, 2008).

[vii] For example, Australia and New Zealand School of Government (ANZSOG) programs such as *Recognising Public Value,* https://www.anzsog.edu.au/education-events/search/recognising-public-value and *The Modern Regulator,* *https://www.anzsog.edu.au/education-events/search/the-modern-regulator,* and the Harvard Kennedy School programs such as *Strategic Management of Regulatory Enforcement Agencies*, https://www.hks.harvard.edu/education/executive-education/strategic-management-regulatory-and-enforcement-agencies.

[viii] https://www.cuttingredtape.gov.au/resources/rpf

See also:

Administering Regulation, Achieving the Right Balance - Better Practice Guide, Australian National Audit Office, June 2014, https://www.anao.gov.au/sites/g/files/net616/f/2014_ANAO%20-%20BPG%20Administering%20Regulation.pdf

Regulator Audit Framework, Productivity Commission 19 March 2014, http://www.pc.gov.au/research/supporting/regulator-audit-framework

ACCC Regulator Performance Framework

[ix] This equates to the concept of the "commonwealth" and the dominant western philosophical view that government is legitimate only insofar as it benefits its citizens. See, for example, Adam Smith: *"[t]he civil magistrate is entrusted with the power not only of … restraining injustice, but of promoting the prosperity of the commonwealth."* (pg. 81, 1776 , *An Inquiry into the Nature and Causes of the Wealth of Nations*, R.H. Campbell, A.S. Skinner, and W. B. Todd (eds.), Oxford: Oxford University Press, 1976.)).

[x] Under the standard public policy model, as reflected for example in the Commonwealth *Regulatory Burden Framework*, it is the role of governments to consider whether there are net benefits of regulation when deciding to regulate and to specify the form of regulation that is best to address a particular market failure. How well governments meet that public policy objective is another matter and not the focus of my comments.

[xi] http://www.abc.net.au/news/2017-05-18/accc-doesn27t-have-the-power-to-stop-banks-passing-on-tax/8536614

[xii] For example, the ACCC has intervened in markets through administrative settlements in relation to:

- the level of and funding source of petrol discount vouchers, adjudicating on an 8cpl discount versus a 4cpl discount, and the funding source for the discount (https://www.accc.gov.au/media-release/coles-and-woolworths-undertake-to-cease-supermarket-subsidised-fuel-discounts);
- the commercial trading terms for online hotel booking platforms (to stop MFN *against third party platforms*, but allow an MFN against the hotel platform) and market conduct of an online air travel booking platform (in contrast, where MFN conduct *directed at the airline platform* was the subject of a successful prosecution). (https://www.accc.gov.au/media-release/expedia-and-bookingcom-agree-to-reinvigorate-price-competition-by-amending-contracts-with-australian-hotels; https://www.accc.gov.au/media-release/high-court-allows-accc-appeal-in-flight-centre-attempted-price-fixing-case).

[xiii] Herbert A Simon, *Administrative Behavior: a Study of Decision-Making Processes in Administrative Organization (4th Ed, Simon and Schuster, 1997)*

[xiv] Michael C Jensen and William H Meckling, *Theory of the Firm: Managerial Behavior, Agency Costs and Ownership Structure (Journal of Financial Economics, Vol 3, Issue 4, 1976)*

[xv] As summarised by Daniel Kahneman in *Thinking, Fast and Slow* (1st Ed, Farar, Straus & Giroux, 2011)

[xvi] While I have not conducted an exhaustive search, in my attendance at various regulatory programs and literature review, I have found no comprehensive or general treatment of the issue of the inherent limits on regulatory decision making, and only limited and more recent consideration of the impact of bias on regulatory decision makers:

- Kovacic and Cooper *Behavioral Economics: Implications for Regulatory Behavior,* Journal of Regulatory Economics, Vol. 41, No. 1, February 2012, George Mason Law & Economics Research Paper No. 13-13, https://papers.ssrn.com/sol3/papers.cfm?abstract_id=1892078
- a serious, if also tongue in cheek, paper by Stephen Littlechild, https://iea.org.uk/blog/regulatory-conduct-authority-applies-behavioural-economics-to-regulators, with a response by George Yarrow, *Heuristics and biases in regulatory decision making*, Letters and Notes on Regulation, No. 3.3 July 2014, http://www.rpieurope.org/Publications/Letters_and_Notes/Yarrow_on_heuristics_and_biases_July_2014.pdf
- see also Henry Ergas *Why Johnny Can't Regulate: The Case of Natural Monopoly*, Agenda, Volume 20, Number 1, 2013

[xvii] External factors are also relevant and important. While it is well accepted that an important reason for independent regulators is to separate regulatory decisions from the political process, little consideration is given to the political nature of the role of regulators themselves. Nor is there much consideration of other regulatory capture risks, for example, the risk of an interest alignment between regulators and selective or tightly organised coalitions of specialised 'consumer' or other (e.g. small business) interests.

[xviii] But they still can be an issue even in competitive markets.

[xix] One feedback comment I received on this paper was the observation that firms do not compete only in the output market but also in those for inputs, and especially for capital: and while acknowledging concerns in competitive markets of short-termism, capital markets do ensure a degree of long term focus and eject (either directly through shareholder action, or by the market for corporate control) poorly performing, too short-term oriented managements. If not perfectly, but to a reasonable degree. In contrast, regulators could be thought of as competing in the market for funding from politicians, whose incentives are very much oriented to the short term, and the lack of any capitalisation mechanism similar to a share

price deprives regulators (and the community) of any credible signal of long term regulatory performance – which suggests that there are powerful incentives for too great a focus on the short-term, which can be mitigated or exacerbated through regulatory institutional design.

[xx] *Australian Gas Light Company v ACCC (No 3)* [2003] FCA 1525 (19 December 2003) http://www.austlii.edu.au/cgi-bin/disp.pl/au/cases/cth/FCA/2003/1525.html?stem=0&synonyms=0&query=title(%222003%20FCA%201525%22); Qantas Airways Limited [2004] ACompT 9 (12 October 2004) http://www.austlii.edu.au/au/cases/cth/ACompT/2004/9.html (this was in effect a joint venture, but also involved an acquisition element); ACCC v Metcash Trading Limited [2011] FCA 967 (25 August 2011); [2011] FCAFC 151 (appeal) http://www.austlii.edu.au/cgi-bin/disp.pl/au/cases/cth/FCAFC/2011/151.html?stem=0&synonyms=0&query=title(%222011%20FCAFC%20151%22); Application for Authorisation of Acquisition of Macquarie Generation by AGL Energy Limited [2014] ACompT 1 http://www.judgments.fedcourt.gov.au/judgments/Judgments/tribunals/acompt/2014/2014acompt0001; Application by Sea Swift Pty Limited [2016] ACompT 9 (28 July 2016) http://www.austlii.edu.au/au/cases/cth/ACompT/2016/9.html; Application by Tabcorp Holdings Limited [2017] ACompT 1 ACT 1 of 2017 http://www.judgments.fedcourt.gov.au/judgments/Judgments/tribunals/acompt/2017/2017acompt0001

[xxi] Some, perhaps contentious, examples for consideration include:

- the ACCC adoption of a mission statement of "making markets work" (egg: *Making markets work for consumers,* Mr Rod Sims, Chairman, National Consumer Congress, Sydney, 16 March 2016, https://www.accc.gov.au/speech/making-markets-work-for-consumers).

  This raises a number of questions, such as whether it is an accurate encapsulation of the role of the ACCC to make markets work as opposed to enforce particular competition laws which are intended to facilitate the competitive working of the market. This may appear semantic, but this high level statement may influence subtly internal approaches to the job at hand. It is also prone to hubris, for example, does the ACCC have the skills to do so; when is it appropriate to try to make markets work or not; is that even achievable? High level organising statements such as this risk, which have a clear positive role in one context, also risk enhancing various accepted decision making biases.

- The ACCC heuristic that "corporate strategy = -1 x competition economics" (egg: *The role of the ACCC in restoring faith in free markets*, Mr Rod Sims, Competition Law Conference 2017, Sydney, 6 May 2017, https://www.accc.gov.au/speech/the-role-of-the-accc-in-restoring-faith-in-free-markets

  The limits of this heuristic were acknowledged by Mr Sims, who added the following caveat: "Let me hasten to add that the vast majority of what companies do is to the benefit of consumers. They spend a lot of time reducing costs, improving their products and opening new stores or facilities. This is why free market economies are so successful."

  Notwithstanding the caveat, the statement is a powerful heuristic, which is an approximation of a business school strategy, which may or may not be applied by some companies. While it is important that the ACCC has a sceptical and testing mindset, the heuristic is acknowledged to be incomplete. It ignores business interest in pursuing strategies of improving efficiency and quality of products to promote sales. It also can conflates an individual firm strategy with the question of how competitive markets work (i.e. the contest by each firm to earn an above market return is the driver of a competitive market to deliver only competitive market returns). That is, individual firms pursuing such strategies against each other, could deliver competitive market outcomes. While these factors are acknowledged by the ACCC, it can be very difficult to counteract such a powerful heuristic (even if you are conscious of it).

[xxii] The National Electricity Rules (NER) and the National Gas Rules (NGR) (together, the Rules) relating to the estimation of the return on equity were significantly amended in November 2012. The key aspects of the rule change included: (a) the removal of any requirement to use the Sharpe Lintner Capital Asset Pricing Model (SL CAPM) (electricity), and the removal of any reference to this model (gas); (b) introduction of a requirement to have regard to all relevant estimation methods, financial models, market data and other evidence; and (c) introduction of a requirement that the return on equity (and the overall allowed rate of return) be estimated such that it contributes to the achievement of the newly introduced allowed rate of return objective.

One of the key drivers of the changes to the return on equity rules was a concern that estimation of the return on equity had become overly formulaic, and unduly bound to a single model (the SL CAPM). The rule-making body therefore sought to ensure that in estimating the return on equity, the AER be required to have regard to all relevant information.

Despite this change in the legal framework, the AER adopted substantially the same approach to estimating the return on equity as it did prior to November 2012. The AER has continued to apply the SL CAPM, and eschewed estimates of the return on equity from other relevant models as a primary source of evidence as to the ultimate cost of equity. Under the foundation model approach, cogent evidence of the cost of equity, including updated evidence as to the return on equity based on relevant estimation methods and financial models and updated market evidence, that does not support or confirm the validity of the foundation model approach and the estimated return on equity derived from it, would appear to be effectively rejected or given no practical weight.

[xxiii] The ACCC determined the initial RAB value for Telstra's fixed line assets as at 1 July 2009 by:

- back solving an asset value from one service price, the ULLS Band 2 price set by the Commission in its 2008/2009 pricing principles review, then applied across Bands 1 to 3 (i.e. the asset value was set so as to deliver a price for ULLS in Bands 1 to 3 that was equal to the Band 2 price in the 2008/09 review); and
- check testing the resulting asset value against the residual regulatory accounting values in Telstra's regulatory accounts for its CAN and IEN assets (after indexing the nominal accounting values for land to derive a real land value).

  In its Discussion Paper (p 47), the ACCC noted: "The ACCC considers that, in determining an initial RAB value for the CAN and Core assets, it is important to protect the legitimate business interests of both access seekers and Telstra. This consideration has led the ACCC to conclude that a clear justification is required for any significant change in existing prices." However, the valuation approach adopted appears inherently arbitrary in that it was based on the selection of one price, from a set of relevant regulatory prices, determined at one point in time (without regard to the anticipated price path) to determine the residual value of Telstra's fixed line network investments. In transitioning from one regulatory framework, it

may have been justifiable to determine the value by reference to the full set of regulatory prices and anticipated price paths, but this was not what the ACCC did.

[xxiv] Australian Energy Regulator v Australian Competition Tribunal (No 3) [2017] FCAFC 80 http://www.judgments.fedcourt.gov.au/judgments/Judgments/fca/full/2017/2017fcafc0080

[xxv] Note the risk of price volatility in relation to the recent NSW network review decisions is being addressed through specific rule changes to smooth the impacts over a longer period.

[xxvi] *The role of the ACCC in restoring faith in free markets*, Mr Rod Sims, Competition Law Conference 2017, Sydney, 6 May 2017, https://www.accc.gov.au/speech/the-role-of-the-accc-in-restoring-faith-in-free-markets

[xxvii] For those interested, the former High Court Chief Justice, the Hon Robert French, recently delivered a paper on this topic to the Competition and Consumer Law Conference in Sydney, *Regulatory Advocacy – The case of competition law and policy,* Competition Law Conference, Sydney, 5 May 2017. In that paper, former Chief Justice French addressed the ACCC's advocacy role generally and specifically in the context of the s 46 law reform debate.

[xxviii] AER submission: https://www.aer.gov.au/system/files/AER%20submission%20-%20COAG%20Energy%20Council%20-%20Limited%20merits%20review%20-%204%20October%202016.pdf

[xxix] See the remarks of the Prime Minister, the Hon Malcolm Turnbull, delivered as part of the 2016 Lowy Lecture: *"We are reforming our competition laws to promote greater protection and encouragement for small and medium businesses"*. Speech delivered at the Lowy Institute, Sydney, 23 March 2016 https://www.lowyinstitute.org/publications/2016-lowy-lecture-prime-minister-australia-malcolm-turnbull

[xxx] https://consultation.accc.gov.au/compliance-enforcement/consultation-on-draft-framework-for-misuse-of-mark/

[xxxi] For example, if there are simply an increasing number of cases over time, does this suggest that the regulator is actually achieving a poor long term compliance outcome? Or pursuing ever more marginal cases to keep the case numbers up?

[xxxii] This could be formulated against specific risks or harms to be reduced or positive behaviours to be improved, by reference to the provisions of the Competition and Consumer Act. For example, a reduction in the level of cartel conduct, an increase in the level of fair and complete business disclosure, and then measures for this could be established and tracked over time.

[xxxiii] Defensive claims can include one or more of the following explanations: this was a case of regulatory judgment, and the court/tribunal impermissibly just substituted its view; the court/tribunal got the law wrong or it got the economics wrong; the law is wrong; there were sneaky lawyers on the other side; there were sneaky clients on the other side and the court preferred their view; this was just cherry picking (i.e., I may have got that aspect wrong, but the tribunal did not have the full picture).

[xxxiv] The regulator's attitude to legal challenge or review of its decisions has important implications. If a regulator is able to see this objectively, it can be used as a tool for improvement in decision-making. However, if the regulator perceives any challenge as simply reflecting an antagonistic or aggressive attitude within businesses, the outcome of any review is unlikely to contribute to improvement in regulatory decisions. This may also have the effect of discouraging review of decisions, since businesses will not want to be perceived as antagonistic, thus further limiting scope for constructive feedback.

[xxxv] Some feedback I received on this paper was sceptical about what could practically be expected of greater consumer representation. The question raised was whether in practice this would strengthen the bias towards short-term price reductions and also over-weights equity issues (which public utility pricing is poorly placed and not designed to address). The view was that the focus on consumer representation may aggravate the challenges I have raised, rather than help to correct them.

[xxxvi] For example, the AER *Better Regulation program* included the establishment of a Consumer Reference Group "to make it easier for consumer representative groups to have input into the Better regulation consultative process"; and a Consumer Challenge Panel "to provide an independent consumer perspective to challenge the AER and network service providers during determination processes". https://www.aer.gov.au/networks-pipelines/better-regulation