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The Trouble with Regulatory Precedent

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In Australian economic regulatory proceedings, a call for regulators to strictly follow something referred to as *regulatory precedent* – seemingly an expectation or requirement for the strict application of past decisions in current decision-making processes – is sometimes heard.

At one level this might simply be interpreted as a reasonable desire for a degree of certainty in the application of regulatory practice and principles. In the extreme, or if applied without caution, the concept of *regulatory precedent* may extend to a quest for certainty of specific outcomes, merely because those same regulatory outcomes were observed in their past and regardless of their practical applicability to the problem of the day.

The term *regulatory precedent* in that strict sense appears to be based, at least in part, on the doctrine of *legal precedent*. However, adoption or adaption of the legal doctrine in its narrowest and strictest form into the world of economic regulation may well lead economic regulators into a self-referencing cycle of simply repeating prior decisions. It may therefore reduce the effectiveness of economic regulation in enhancing consumer welfare.

It is right for economic regulators to be aware of and have regard to past (and current) *regulatory practice* – but to elevate that practice to the status of a binding precedent is to be avoided.

What is the problem?

Economic regulation is a relatively modern practice in this country. It is, at its heart, the real-world application of a set of inter-disciplinary skills, tools and practices. Those are deployed under the broad rubric of 'regulation' in order to meet a specific end or to address the specific mischief of a given case.

In that sense, economic regulation can be said to be founded in economic principles and theory, given direction through policy and applied through the law. Whilst regulation busies itself on a day-to-day basis through the utilisation of audit, financial and compliance systems, it should utilise relevant approaches and practices from each discipline as appropriate. Regulators have at their disposal a veritable panoply of disciplines to draw on in finding solutions to problems. This unique access to a broad range of disciplines as part of a regulator's tool kit is what gives the regulator its advantage.

If, however, the practice of economic regulation draws too heavily on past decisions in the way that might be implied by *legal precedent*, then the efficacy and benefit of the broader suite of approaches and practices becomes diluted.

Oxford Dictionaries distinguishes between precedent in a general sense (*An earlier event or action that is regarded as an example or guide to be considered in subsequent similar circumstances*) and as it relates to the law (*A previous case or legal decision that may be or (binding precedent) must be followed in subsequent similar cases*). It is the latter definition which may have adverse impacts for economic regulation if applied to decision-making.

Contents

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Of course, regulators are quite properly bound by legal precedent – the reasons and principles applied by a court or tribunal in reaching a decision – where that doctrine has application. By simply making a regulatory decision in one way because, for example, another regulator, in another place at another time has made a decision that way, is apt to lead to error.

It is likely to fail to recognise the particular legal and policy framework, and the broader economic, social and environmental context, within which the regulatory decision is being made and, mostly importantly, may not best protect those who should properly be the focus of the regulator's attention.

Whence precedent?

The doctrine of *legal precedent* is a hallmark of the common law. It gives common law reasoning a distinctive quality, differentiating it from other forms of reasoning. It attempts to strike a balance between stability and predictability in the law without imposing parochial inflexibility, allowing the broad contours of legal canon to be generally known and discoverable. The dependence of legal reasoning on argument by analogy is a by-product of adherence to precedent (Cross 1977 pp. 24-26). The doctrine incorporates the concept of *stare decisis* (the decision stands): a court is bound to follow a previous decision of itself or a higher court.

The application of *legal precedent* requires a balancing of the need for continuity, consistency and predictability with the need for justice, flexibility and rationality. Courts are not bound by everything that is said in a prior judicial decision or by all of the judicial observations of a higher court. What binds are the reasons for the decision (*ratio decidendi*),[1] which is ascertained by analysing the decision of the judge or the judges of the majority. The decision itself (or the 'judgment') is not at the forefront of that analysis: it is the reasoning that is critical.

Law, as an attribute of the system of government in a free and democratic society, is always in a process of evolution. Judges ultimately determine whether and under what circumstances a particular principle of legal precedent will apply. A court is not required to follow a prior decision, or to adopt prior reasons, which it is convinced are erroneous.

Justice Murphy articulated the risk of strictly following precedent, concluding that slavish obedience to precedence is *'… eminently suitable for a nation overwhelmingly populated by sheep'* (Murphy 1979 p. 5).

Every few hundred millennia, evolution leaps forward[2]

Economic regulators in Australia are presently facing, and seeking solutions to, problems not faced and perhaps not even contemplated by their predecessors.

In that light, an appropriation of a strict doctrine of precedent into the realm of economic regulation may foreclose the evolutionary thought and practices needed to address the new problems being faced. It may fetter economic regulators by requiring strict adherence to past decisions, even where new situations do not warrant application of those decisions.

At the same time, however, no one could sensibly deny that economic regulation has adopted, and should continue to absorb, the general approach found in the law: the balance between the need for continuity, consistency and predictability and the need for fairness, flexibility and rationality in decision-making.

That balancing approach reflects the wider needs and expectations of the community.

The idea that 'Well, *when my information changes, I change my mind. What do you do?*' (Samuelson 1970) is probably of more value to a regulator than is simple application of a prior decision due to an overly strong reliance on *regulatory precedent*.

If not regulatory precedent then what?

Regulators, when all else is stripped away, are problem-solvers.

To be a good problem-solver, a regulator takes the problem at hand and applies theories and practices within an overarching legal and policy framework, to make meaning and find solutions.

Economic regulators are no different. Economics is a theory-based discipline and theories should and must be tested through the application of data. With new data and scenarios, theories can be found wanting; requiring change, or displacement and substitution by new theories.

To be most effective, economic regulation needs regulators to respond to unforeseen risk drivers; for example, the impact of depressed equity markets, droughts, catastrophic bushfires, cyclones or community or shareholder demands.

[1] Cross and Harris (1991) at 72. Cf MacAdam and Pyke (1998) at 41 [3.17].

[2] Professor Charles Francis Xavier, *X-Men (2000)*

As a general proposition, this requires evolution, not revolution.

Evolution requires problem-solving agility, an ability to learn from the past and to adapt to changing circumstances. It also needs a framework that does not bind the regulator to past decisions or decisions of others with no regard for the unique circumstances faced by that regulator.

If a regulatory solution designed to deal with problem A is applied to problem B without critical thought (what are the facts and circumstances of problem B?; what is problem B's context?) then the application of a theory or way of approaching the problem is no more than a blind and uninformed choice.

The outcome of such a process is unlikely to be a useful or efficient response to the problem at hand, detracting from the primary purpose of economic regulation.

This implies that a narrow and strict conception of *regulatory precedent* ought to give way to the broader concept of *regulatory practice*. A clear distinction between these two concepts needs to be drawn and brought to the attention of regulators, the regulated, law makers and policy makers.

This would not mean that the goals of consistency and predictability cannot be achieved. Consistency and predictability does not have to mean recycling the same reasoning and outcome regardless of the specifics of the problem at hand. A regulator can be consistent in its open and transparent approach, consistent and predictable in its professional dealings and committed to delivering solutions to the problem at hand. It does not need to be bound by precedent in doing so, all of those matters are matters of practice.

It is imperative, if regulation is to evolve as it needs to, that economic regulators remain ever vigilant of the creep of regulatory languor. Regulation is a construct of human agency, and *'human agency is subject to investigation and analysis, which it is the mission of understanding to apprehend, criticise, influence and judge. Above all, critical thought does not submit to state power or to commands to join the ranks marching against one or another approved enemy'* (Said 1978 p. xxii).

If economic regulators apply theories and practices used in previous decisions to address a different set of facts and problems, they may be signalling that they are no longer effective problem-solvers.

The concept of regulatory practice is, therefore, most likely the proper descriptor of what those who use the term regulatory precedent truly mean (or are attempting to describe) as they search for predictability, flexibility, responsiveness and validity in decision-making.

Regulatory practice is about building on the lessons of the past to create solutions for the current problem. *Regulatory practice* is about improving solutions with the regulatory tools at hand – perhaps (Winston Churchill): *'to improve is to change, so to be perfect is to change often'* (James 1973 p. 3706). The evolutionary nature of regulatory practice denotes a discipline that is responsive and reflexive.

What does this mean, in practice?

However seductive or easy it might seem to think otherwise – the view that the problem posed above is a distinction without a difference – the issue here is not simply one of semantics.

Let us assume that, in performing its statutory regulatory functions, an economic regulator is required under its empowering Act to, amongst other things, have regard to *the need to promote consistency in regulation with other jurisdictions*.

Of course, in this example the Act says no more than 'promote consistency'; it does not say 'apply precedent'. However, if those words were to be given a liberal and arguably unwarranted meaning in a regulatory process – if a party (be it the regulator itself or another stakeholder) were to argue that those words somehow drew out legal concepts of precedent – then the following areas at the very least would need to be settled:

- Define 'promote': is the regulator the principal or agent?
- Define 'consistency'. The ordinary meaning of 'consistency' (*Oxford Dictionaries*) is: *'the quality of always behaving in the same way or having the same opinions, standard, etc.'.* Does local regulatory practice/approach and outcome have to be same as in all other states and territories or globally?
- Ascertain which functions the legislature intended – all functions, regulatory functions only or administrative functions.
- Define 'other jurisdictions'.

Let us presume for the sake of the example that all of these matters noted above have been settled, as explained in the following paragraph, and that the regulator has made those settled positions known as the *regulatory precedents* which will apply.

Through custom and practice, 'promote' is to mean that the regulator is both principal and agent (that is, both actor and subject); that, in being consistent, the regulator has been and will be consistent with, say,

the Nigerian regulatory approach in relation to water utilities, South African regulators in relation to telecommunications and energy, Guatemalan regulators in relation to postal services and the Liechtenstein regulators in relation to rail. Finally, the regulator has through custom and practice interpreted 'its functions' to denote all of its functions.

Now let us assume that the regulator is to make a new determination in relation to a matter for which it has made a previous determination. That previous determination was based on the foregoing customs and practices.

In preparing for the new determination, the regulator and its staff quite properly begin to consider other approaches (through research and application of economic theory), newly arising circumstances in its jurisdiction and other matters arising (for example, through public engagement and consultations).

As a result, the regulator forms the view that it ought to, as a matter of principle and to best protect consumers' interests, change its regulatory approach from those previously-accepted customs and practices. In doing so, it does not conclude the previous customs and approaches were wrong *per se*, it has simply formed the view that there is now a better way to meet the statutory and regulatory ends.

The result would be the regulator departing from a strictly deterministic regulatory approach to one that involves explicit considerations of risks presently prevailing. It would make a determination that is responsive to and provides a solution to the problems it faces.

While that determination would be based on economic theory and arguably on better-practice regulatory principles, would meet all legislative obligations and be considered (presumably by at least the regulator itself) to meet the relevant statutory and regulatory ends, if a strict interpretation of *regulatory precedent* is used, overly relied on or given undue weight, the regulator's decision could be open to challenge.

Why?

Because it did not do what it had done previously and was not consistent with its own prior decision. The difficulty is magnified, as our example regulator has openly and publicly said in the past that it relies on its *regulatory precedents* in its decision-making.

If, however, rather than relying on a conception of strict *regulatory precedent* in the sense described above, the regulator made it known that its new determination would instead have regard to or take account of what we might call *regulatory practice* (which in reality is what our example Act is asking for), then the regulator and all of those with an interest in the new decision would be better equipped to navigate the choppy waters of the regulatory process.

Applying *regulatory practice* would entail the regulator identifying the specific problem; looking to the terms of the prevailing legal framework; understanding where there is common ground or a basis for drawing from the past decisions of itself and other regulators; understanding where other regulators' thinking and practices are changing, both in process and in new methods and theories being embraced; and then making a decision which takes all of those matters into account.

The regulator would be able to justify its new regulatory approach, explicitly acknowledging that, while it based its earlier decision on a particular custom and approach, due to a change in circumstances, the new approach best meets its statutory objectives. At the same time, it could still adapt or adopt elements of prior practice, as appropriate and necessary.

Above all, it would not have bound itself to a mere replication of its last decision.

This *regulatory practice* type of approach can be seen in the 2013 United Nations report on better practice in the regulation of state-owned and municipal water utilities (see Berg 2013). The report does not refer to *regulatory precedent*. It talks of *regulatory practice* rather than perpetuating the fallacy that, even if confronted with problem B, regulatory decisions are precedents which act to bind the regulator and regulated entities to solutions designed to solve problem A.

In a similar vein is Ofgem's 2014 decision as to its methodology for assessing the equity market return for the purpose of setting RIIO-EDI price controls (Ofgem 2014). Its reasons for decision stepped through the background for the changes in the methodology proposed (as compared with past practice), including the history and context of the re-defined problem it was trying to solve.

Ofgem chose to change its regulatory approach in response to a changing operating market. It *'decided to give greater weight to the influence of current market conditions in relation to the equity market return'* (p. 1). The decision highlighted why past practice was no longer appropriate to meet Ofgem's regulatory objective and it described the new approach as being *'consistent with good regulatory practice'* (p. 6).

On the other hand, for an example of where the courts have critiqued a regulator's application of

regulatory precedent, see *Business Roundtable v. Securities Exchange Commission*.[3] The appeal court identified that, whatever the theoretical and precedent merits of the Securities Exchange Commission's analysis, its regulatory decision was based on assumptions that were not reflective of the circumstances of the problems with which it was presented. With the SEC and other regulatory agencies facing increasing legal challenges, the courts of the United States have developed a number of administrative law doctrines for those agencies to demarcate the limits of judicial review of agency rules and decisions (orders). In doing so, they have recognised that legal doctrines (such as that of precedent) are not always well-suited to the exercise of regulatory functions.[4]

Finally, the specific legal framework within which economic regulation occurs is of central importance. The framework applicable to each regulator will dictate certain approaches and application of past practice.

What is to be remembered is that legal frameworks often differ between jurisdictions. This lends further weight against the simple application of *regulatory precedent*. Regulator A cannot simply apply the decisions of another regulatory framework, with its own 'have regard to' clauses, policy directions and procedural obligations, to its own context, without considering the reasons for and implications of those differences.

What if the same clauses, policy directions or procedural requirements do not apply in the case of regulator A? In any event, would the same decision have been made in the first instance if those matters had not applied to the original decision-maker? Does the original decision reflect an underlying 'correctness' of theory or approach, or is it simply a construct which reflects its own circumstances?

All of those considerations tend against a strict conceptualisation of *regulatory precedent*.

Whither regulatory practice?

To avoid problems in the nature of those outlined above, regulators must first understand the unintended consequences of using a strict concept akin to the legal doctrine of precedent in their regulatory decisions.

They must then have the discipline and rigour to not use the term *precedent*; regulators should be freely and openly discussing better *regulatory practices*, not *regulatory precedent*.

Economic regulators occupy a unique place in society, not quite government, not quite social advocates and not quite business advocates. They exist, ultimately, through the will of the people as expressed by the Parliament in laws. They are given a purpose through those laws. That purpose, which can be variously expressed, generally revolves around serving society's interests through encouraging and facilitating enhanced economic efficiency.

In serving society in this way, economic regulators are empowered (within the legal bounds of the laws which create and empower them) to reflect social, economic and other changes in their solutions to the problems they presented with.

However, there must be a certainty as to the process or defining and refining the principles and approaches that they will apply – economic regulators should no more create a sea of uncertainties than they should bind themselves blindly to the past. To create certainty as to the principles and approaches requires economic regulators to have regard to *regulatory practice* in its proper sense; not a mere application of historical solutions to current day problems.

The rule of law (of which the doctrine of legal precedent is a subset) has earned its moral and juridical legitimacy by taking into account principles of the society in which it is situated (for example, in a democratic society, that is the administration of the country's resources on behalf of its citizens[5]), market forces (free or restrained), human rights and subjecting the state to the rule of law.

Regulation is not the rule of law. Regulation is (at its simplest) a tool to provide a solution to a defined problem at a given point in time. Regulators are simultaneously boundary-riders of the regulatory framework and problem-solvers.

If regulators and regulated entities continue to use the terminology of *regulatory precedent* to bind themselves to past *regulatory practice*, they will not be able to properly address the problem at hand. Such an outcome is antithetical to the *raison d'être* of regulation and regulators.

[3] 647 F. 3d 1144 – Court of Appeals, Dist. Of Columbia Circuit.

[4] Chevron, U.S.A., Inc. V. Natural Resource Defense Council, Inc. 467 U.A. 837 (1984).

[5] Alexis de Tocqueville, Democracy in America (1835).

'Our role is to widen the field of discussion, not to set limits in accord with the prevailing authority.' (Said 1978 p. xvii)

To rely strictly (even if inadvertently) on a doctrine of precedent in some sort of quasi-legal sense, while understandable, is a mistake to be avoided if regulators wish to have relevance and add value by being the very thing they excel at: problem-solving.

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Critical Issues in Regulation – From the Journals

The Economics of Organizing Economists, Luke Froeb, Paul A Pautler, and Lars-Hendrik Röller, Vanderbilt University Law School, Law and Economics Working Paper Number 08-18.

This article, which was first posted in July 2008 and revised in November 2012, addresses the issue of organising economists within a competition agency. The authors, Luke Froeb, Paul A Pautler and Lars-Hendrik Röller, contend that antitrust law is moving towards an effects-based approach. They further argue that, focusing on the economic impact of behaviour rather than on its form, means that integrating economic analysis into enforcement decisions has become increasingly important. The authors argue that a functionally organised competition agency, with economists in their own section, produces higher-quality analysis than having the economists spread across divisions. However, focusing the analysis on questions of interest and integrating the economic analysis into the decision-making process, are more difficult when the economists are separate than with a divisional form, where economists and attorneys are put together in sections organised around specific sectors or industries. This paper analyses the trade-off between these two institutional arrangements, with a particular focus on the role of economists in competition agencies around the world. Jurisdictions referred to in this paper include the European Union, Sweden, the United Kingdom and the United States. The authors conclude that an effective functional organisation requires strong horizontal links across the legal and economic sections, and that an effective divisional organisation requires both independent economic and attorney recommendations, and managers who possess functional expertise in both economics and the law. There are 31 items in the reference list.

This article, which is a little older than those usually included in 'From the Journals', can be downloaded without charge by clicking here.

Rethinking Regulation, Kenneth W Costello, *Public Utilities Fortnightly*, 153, 3, March 2015, pp. 34-37, 58-59.

This paper is about policy-making for the regulation of the electricity industry, particularly in light of the advent of distributed generation (DG) and the 'smart grid'. The author, Kenneth Costello, a principal researcher with the National Regulatory Research Institute at Ohio State University, has been writing about regulation of the US electricity market for over twenty years. This paper considers policies in the light of their consequences for both economic efficiency and 'fairness'. There are five main headings in the article: new technologies; business models; rate designs; social mandates; and predicting the future.

The author criticises the steeply tiered inclining-block tariffs used in some jurisdictions, which, in his view, instead of protecting low-usage and lower-income users, have resulted in the installation of solar photo-voltaic (PV) systems by higher-usage and often higher-income users. He claims that this has resulted in both economic inefficiency and redistribution of wealth towards higher-income customers. Kenneth Costello also makes observations on forecasting the demand for electricity, suggesting that forecasts be evaluated according to their objectivity. He suggests that particular caution needs to be exercised where predictions come from 'interest groups with a quasi-moralistic or profit-making agenda'.

Finally, the author suggests that policy-makers should be hesitant about making commitments now when there is uncertainty because there may be an option value from delaying the decision. The author also broadly favours market outcomes over interventionist ones; particularly the use of subsidies, where the costs are hidden and which, in his view, will 'usually fail a cost-benefit test'. Real-time pricing is more generally favoured.

This article can be accessed by subscription to *Public Utilities Fortnightly*.

Demand Response in Adjustment Markets for Electricity, Claude Crampes and Thomas-Olivier Léautier, *Journal of Regulatory Economics*, 48, 2, October 2015, pp. 169-193.

This article examines the participation of consumers in adjustment markets for electricity in the context where economic efficiency (which is equated with economic welfare) is the goal of economic policy. The authors, Claude Crampes and Thomas-Olivier Léautier, are professors at the Toulouse School of Economics. Section headings in the article are: introduction; the benchmark model; contracts under asymmetric information; welfare comparison; regulatory issues; and conclusion. The exposition is technical, and the particularly technical material (proofs) is contained in an appendix. There are seventeen items in the reference list.

Adjustment markets enable participants to respond to random supply shocks occurring after quantities have been contracted. If markets were perfect, opening the adjustment market to consumers would always increase ex post economic efficiency (and hence, economic welfare). In reality, markets are imperfect, and some consumers hold private information on their value for electricity, giving rise to informational asymmetry. The authors demonstrate that, under such information asymmetry, allowing consumers to participate in the adjustment market may actually reduce economic welfare. This arises because electricity suppliers in the model propose inefficient ex ante retail contracts to make them incentive compatible and to limit the information rents they must 'leave on the table' for consumers to prevent them from misreporting their private information. If the value of ex post efficiency gains due to consumers' participation in adjustment markets is low, whereas the information distortion is high, the overall net effect is a decrease in economic welfare.

This article can be accessed by on-line purchase or by subscription to the *Journal of Regulatory Economics*.

Fixed-Mobile Substitution and Termination Rates, Steffen Hoernig, Marc Bourreau, and Carlo Cambini, *Telecommunications Policy*, 39, February 2015, pp. 66-76.

This paper studies the effect of termination rates on both fixed-line and mobile networks on the observed substitution between fixed and mobile calls and between subscriber access. The paper is structured as follows: an introduction to the paper contains a review of the theoretical and empirical literature on fixed-to-mobile substitution and the 'waterbed effect'; section two sets up the model and develops the pricing equilibrium; section three sets out the simulation results for the effects of termination rates on subscriptions and optimal termination rates; the fourth section contains the conclusions; and an appendix contains the more technical proofs. There are 24 items in the reference list, mainly being to journal articles (for example, The Journal of Regulatory Economics, Information Economics and Policy and Telecommunications Policy) with years of publication ranging from 1998 to 2014, and being concentrated around 2002-2003 and 2009-2012.

The authors observe that fixed-line termination charges have long been heavily regulated to cost; while mobile termination charges have only recently been subject to regulation, with regulated charges set above cost. The authors present what they see as a 'tremendous success' in mobile telecommunications, and attribute this in part to the high mobile termination rates having a positive effect on mobile subscription. Numerical simulations are used to analyse the effects of fixed and mobile termination rates on the number of fixed and mobile users.

The article can be purchased on-line or by subscription to *Telecommunications Policy*.

The Capital Structure of a Firm under Rate of Return Regulation: Durability and the Yield Curve, Garret Kent Fellows, *Journal of Regulatory Economics*, 47, 2015, pp. 273-299.

This paper contains the author's presentation of a generalised dynamic model of business behaviour under rate-of-return regulation. The model and results presented in this paper extend the standard Averch-Johnson (AJ) interpretation of overcapitalisation and provide important new implications. These novel features relate to amortisation and cost-of-capital considerations. The author, Garret Kent Fellows, claims that the assumptions underlying his model are more realistic than the 'static workhorse AJ model', and that the results are more directly applicable to real-world regulation. In the real world, historical investment and amortisation decisions determine much of a business's revenue requirement and, ultimately, the profits and regulated price. The results in this model are similar to (yet distinct from) the classic Averch-Johnson effect. While this is a technical economic model, the body of the paper is as non-technical as possible, and the very complicated material is contained in appendices. There are 32 items in the list of references.

The modelled business has access to multiple types of capital which are substitutes (imperfect or perfect) in production. These capital inputs are differentiated based on durability and heterogeneous marginal effects on the business's total cost of capital. This approach is kept general but is motivated by the stylised shape of the bond-yield curve, wherein high-durability (longer-lived) assets command a higher required return on investment (higher bond yield). The results indicate that a regulated business (relative to an unregulated business) will over- or under-invest in specific assets depending on their durability and the size of the assets' marginal effects on the cost of capital relative to the regulated rate of return. Two specific sources of distortion in the capital structure are identified. First, the 'yield curve' effect pushes the business further (relative to the unconstrained case) towards assets with a low marginal contribution to the cost of capital, thus reducing the business's average cost of capital. Second, the 'duration' effect pushes the business towards longer-lived assets as a means of inflating the steady-state capital stock.

This article can be accessed by on-line purchase or by subscription to the *Journal of Regulatory Economics*.

Risk and Regulation in Water Utilities: A Cross-country Comparison of Evidence from the CAPM, Roger Buckland, Julian Williams, and Janice Beecher, *Journal of Regulatory Economics*, 47, 2, April 2015, pp. 117-145.

This paper addresses a core issue for the regulated utility: What are the risks taken by investors in businesses that supply a product whose supply is regulated? US utilities are generally regulated by setting a permitted return on book equity during periodic rate cases. The permitted rate is intended to deliver a 'fair' return to investors for the risks of the activity that they finance. The fair return is understood to exceed the cost of capital. Setting the return at the cost of capital would fully compensate investors for risk and allow utilities to attract financial capital, but regulators enhance the return for policy purposes, specifically to encourage socially beneficial investment providing a 'return premium' in addition to a 'risk premium'. In contrast, UK utilities have generally been regulated by price caps based on the RPI–X principle. In establishing the level of X in the price cap, the regulator must assess what revenue stream is required to provide adequate compensation for the investment in the utility's assets, considering the time and the risk involved in financing the utility. There are 54 references; mainly to articles in academic journals and to reports from government agencies.

Prior research by two of the authors on returns of regulated water supply and distribution businesses concluded that regulation interacts significantly with equity returns, and that the systematic risk and hence required returns of water utilities' equity were low and decreasing over time. The research in this paper analyses the returns on securities issued by regulated water businesses in the differently regulated economies of the UK and the US, using data from 1980 to 2010. Reflecting the results from the 1990s, the evidence suggests that UK regulators have chronically overestimated the systematic risks borne by investors in water utilities, resulting in lax pressure on permitted returns and higher prices than are needed for efficiency. The analysis also confirms that there are differences between the regulatory risks and patterns of returns for private-sector water utilities in the UK and the US.

This article can be accessed by on-line purchase or by subscription to the *Journal of Regulatory Economics*.

Negotiate-Arbitrate Regulation of Airport Services: Twenty Years of Experience in Australia, Margaret Arblaster, *Journal of Air Transport Management*, 51, March 2016, pp. 27-38.

This paper is about the economic regulation of major airports. In many countries major airports are subject to some form of economic regulation because they have been considered to have monopoly characteristics. Over time, the development of competitive influences, such as through the growth of alternative airports and modes of transport, has led to debate over the extent to which there is competition between airports, and whether economic regulation of airports is warranted. Margaret Arblaster concludes that the Australian case history shows that negotiate-arbitrate regulation (NAR) is a targeted and flexible approach to economic regulation of airport infrastructure services where dominance is a concern. It is further concluded that NAR is an approach to economic regulation which is potentially consistent with principles of good regulation, including: minimising regulatory intervention; balancing the interests of airports and airport users; and providing protection against the use of market power. However, the regulatory design is critical to the effectiveness of the approach and the resource costs of using the framework.

This article can be accessed by subscription to the *Journal of Air Transport Management.*

Estimating the Market Risk Premium using Data from Multiple Markets, Martin Lally and John Randal, *Economic Record*, 91, 294, September 2015, pp. 324-337.

This paper is about the development of an estimator of the market risk premium for a country. Nineteen countries, including Australia and New Zealand, are included in the study. The procedure involves combining an estimator based only on local data for each country with the cross-country average of these estimators. The authors argue that using only local data is 'significantly inferior to the use of a cross-country average'. The section headings in the article are as follows: introduction; theory; an example; comparison of estimators; alternative assumptions; alternative methodologies; and conclusions. An appendix sets out proofs for five of the equations in the body of the paper. There are thirty-seven items in the reference list, that are all references to articles in professional journals or books. Year of publication ranges from 1952 to 2011; and twenty-five of the items listed were published between 1952 and 2000.

This article can be accessed by on-line purchase or by subscription to the *Economic Record*.

Regulatory Decisions in Australia and New Zealand

Australia

Australian Competition and Consumer Commission (ACCC)

Viterra's Bulk Wheat Ports: Long-Term Agreements Approved

On 3 December 2015 the ACCC released a final decision to approve Viterra's proposal to introduce long-term agreements to allocate port capacity at its six South Australian bulk wheat ports.

Draft Proposal from Australia Post for a $1 Basic Postage Rate: ACCC Does not Object

On 27 November 2015 the ACCC issued its view not to object to a draft proposal from Australia Post to introduce a basic postage rate (BPR) of $1. Australia Post is proposing to introduce a basic postage rate (BPR) of $1 for letters delivered on a new timetable, which allows an extra two business days for delivery to occur. Australia Post plans to introduce the new BPR in January 2016.

Transurban Consortium's Proposed Acquisition of Brisbane's AirportLink M7: ACCC will not Oppose

On 26 November 2015 the ACCC announced it will not oppose the proposed acquisition of the AirportLink M7 in Brisbane by a consortium led by Transurban. The consortium consists of AustralianSuper Pty Ltd, Tawreed Investments Limited and Transurban (Transurban Holdings Limited, Transurban International Limited and Transurban Infrastructure Management Limited).

Brookfield's Undertakings not Accepted

On 26 November 2015 the ACCC announced that it has decided not to accept undertakings offered by Brookfield Infrastructure Partners LP in relation to its proposed acquisition of Asciano Limited.

Harper Review: ACCC Welcomes the Government's Response

On 24 November 2015 the ACCC welcomed the release of the Government's response to the recommendations of the Harper Review, stating that the ACCC supports the Government's new microeconomic reform agenda, which strongly affirms competition principles as a basis for action.

Water Charge Rules: Draft Advice Released

On 24 November 2015 the ACCC released its draft advice on amendments to the Commonwealth's water charge rules, setting out the ACCC's draft positions and seeking further submissions on proposed changes to the rules. According to the media release the proposed charges are targeted at promoting efficient and sustainable use of water infrastructure, facilitating effective water markets and improving transparency of charging arrangements, while addressing the need to reduce burden.

Superfast Broadband Access Service: ACCC Proposes to Declare

On 6 November 2015 the ACCC released a draft decision proposing to declare a Superfast Broadband Access Service. Currently, some superfast broadband services are already declared, some are subject to carrier licence conditions, others are subject to ministerial exemptions with conditions, while still others are not regulated.

Container Stevedoring Monitoring: Annual Report Released

On 6 November 2015 the ACCC released its annual container stevedoring monitoring report.

Fixed line Services: Final Decision Released

On 9 October 2015 the ACCC released its final decision on the prices that other operators pay to use Telstra's copper network to provide telecommunications services to their consumers. The final decision required a one-off uniform fall of 9.4 per cent in access prices from current levels for the seven fixed line access service to apply from 1 November 2015 until 30 June 2019.

Port Kembla Wheat Ports: Exemption Intention Confirmed

On 1 October 2015 the ACCC released a position paper confirming that it intends to grant exemptions to GrainCorp and Quattro from having to comply with Parts 3 to 6 of the Wheat Code at their respective Port Kembla terminal facilities.

Australian Energy Market Commission (AEMC)

East Coast Gas Market: Recommendations for Balanced Reform

On 4 December 2015, the AEMC released its recommendations for a balanced reform program to promote the COAG Energy Council's vision for development of the East Coast gas market. The recommendations include: redesign of the wholesale

market; improved pipeline capacity usage; and improved price transparency. The AEMC also released its recommendations on the Review of the Victorian Declared Wholesale Gas Market (**see here**).

Residential Electricity Price Trends Report

On 4 December 2015, the AEMC released its **Residential Electricity Price Trends Report**. The Report examines trends in the underlying cost components of household electricity bills - including the competitive market sectors of wholesale generation and retail; the regulated networks sector; and price implications from government environmental policies.

Expanding Competition in Metering and Related Services

On 26 November 2015, the AEMC made a final rule that will open up competition in metering services and will give consumers more opportunities to access a wider range of services.

AEMO Allowed Access to Demand Forecasting Information

On 22 October 2015, the AEMC made a rule that explicitly allows the Australian Energy Market Operator (AEMO) to prepare demand forecasts at the connection point and regional level as part of its National Transmission Planner functions.

Australian Energy Regulator (AER)

Victorian Distribution Networks' Tariff Structure Statements Published

On 3 December 2015 the AER published an issues paper on the tariff structure statements proposed by the Victorian distribution networks.

Tariff Structure Statements Received

On 1 December 2015 the AER announced it had received the second round of Tariff Structure Statement (TSS) proposals from the Queensland, New South Wales and Australian Capital Territory electricity distribution businesses.

Second Annual Benchmarking Reports Published

On 30 November 2015, the AER published its second annual benchmarking reports for electricity distribution and transmission networks.

AusNet Services Tariff Structure Proposal

On 30 October 2015 the AER published AusNet Services Tariff Structure Statement proposal.

Queensland Electricity Distribution Businesses: Final Decisions

On 29 October 2015 the AER issued final decisions on the revised revenue proposals submitted by the Queensland electricity distribution businesses Energex and Ergon Energy.

South Australia Electricity Distribution Businesses: Final Decisions

On 29 October 2015 the AER issued its final decision on the revised revenue proposal submitted by the South Australian electricity distribution business SA Power Networks.

Victoria Electricity Distribution Businesses: Preliminary Decisions

On 29 October 2015 the AER issued preliminary decisions for AusNet Services, CitiPower, Powercor, Jemena and United Energy, which are expected to reduce the amount consumers pay for electricity in Victoria.

National Competition Council (NCC)

Application for Declaration of Shipping Channel Services at the Port of Newcastle

On 10 November 2015, the NCC sent to the Federal Treasurer its final recommendation in respect of the application by Glencore Coal Pty Ltd for declaration of the shipping channel service at the Port of Newcastle.

Australian Capital Territory

Independent Competition and Regulatory Commission (ICRC)

Water Pricing Tariff Structure Review

See 'Notes on Interesting Decisions'.

New South Wales

Independent Pricing and Regulatory Tribunal (IPART)

Retail Gas Prices and Charges: Review

See 'Notes on Interesting Decisions'.

Solar Feed-In Tariffs – Final Report

On 15 October 2015, the IPART released a Final Report and Final Determination on solar feed-in tariffs in 2015-16. Its Final Determination is that in 2015-16 the benchmark range for solar feed-in tariffs is 4.7 to 6.1 c/kWh and the retailer contribution is 5.2

c/kWh. These decisions are 0.3c/kWh higher than its Draft Determination in August 2015 due to a higher forecast average wholesale spot price in 2015-16. Its Final Determination will take effect from 15 November 2015.

Northern Territory

Utilities Commission

Final Compliance Framework and Reporting Guidelines

On 2 October 2015, the Utilities Commission published its final Compliance Framework and Reporting Guidelines.

Queensland

Queensland Competition Authority (QCA)

Queensland Rail's Draft Access Undertaking – Draft Decision

On 8 October 2015 the QCA released its draft decision (click here) on Queensland Rail's 2015 draft access undertaking (2015 DAU). Stakeholders were invited to comment on the draft decision, with submissions due by 24 December 2015.

South Australia

Essential Services Commission of South Australia (ESCOSA)

National Energy Customer Framework – Review

On 4 December 2015 the ESCOSA released its draft findings for the review of the National Energy Retail Law, which establishes the National Energy Customer Framework. (**click here**)

Ports – Price Monitoring Report

On 24 November 2015 the ESCOSA released its 2015 Ports Price Monitoring Report to provide stakeholders and the general public with information on charges across six of Flinders Ports' commercial ports.

Retailer Feed-in Tariff

On 2 December 2015 the ESCOSA made its Final Decision to set a 2016 minimum R-FiT of 6.8 cents per kWh. On 23 October 2015 the ESCOSA had published a report prepared by ACIL Allen Consulting on the minimum Retailer Feed-in Tariff (R-FiT) to apply in South Australia in 2016 which calculated a 2016 minimum R-FiT of 6.8 cents per kWh, which is greater than the 2015 minimum R-FiT of 5.3 cents per kWh.

Tasmania

Office of the Tasmanian Economic Regulator (OTTER)

New Tasmanian Economic Regulator Announced

See 'Regulatory News'.

Victoria

Essential Services Commission (ESC)

Water Pricing Approach – Conference and Further Consultation

On 24 November 2015 the ESC placed on its website **the papers** from the conference held on 9 and 10 November 2015 and called for further submissions.

Review of Victorian Electricity Distributors' Guaranteed Service Level – Draft Decision

On 18 November 2015 the ESC released its Draft Decision on the Review of Victorian Electricity Distributors' Guaranteed Service Level Payment Scheme.

Water Price Review 2016 – Melbourne Water

In April 2015 the ESC released its 2015 Consultation Paper on Melbourne Water's 2016 price review; a new requirement under WIRO 2014. The ESC must approve new prices for Melbourne Water for the pricing period commencing 1 July 2016.

Best Practice Financial Hardship Programs of Retailers – Inquiry

On 27 March 2015 the ESC released an issues paper for its review of the policies, practices and procedures that energy retailers use to help customers in financial hardship avoid disconnection. **View the submissions received.**

Western Australia

Economic Regulation Authority (ERA)

2015 Review of Railway (Access) Code 2000 – Publication of Submissions

On 23 November 2015, the ERA issued a notice of publication that it had published eight submissions it received in response to the Draft Report on the Review of the Railways (Access) Code 2000. These

submissions were received from: Aurizon; Australian Rail Track Corporation; Brockman Mining Pty Ltd; Brookfield Rail Pty Ltd; CBH; Roy Hill Infrastructure Pty Ltd; The Pilbara Infrastructure Pty Ltd; and WA Farmer's Federation.

Brookfield Rail Segregation Arrangements – Draft Decision

On 12 November 2015 the ERA announced its **Draft Decision** to approve Brookfield's proposed segregation arrangements subject to twelve required amendments.

New Zealand

New Zealand Commerce Commission (CCNZ)

Eastland Port Commercial Resolution

On 25 November 2015 the CCNZ **announced** that it welcomed the commercial agreement reached between Eastland Port and forestry customers and confirmed its proposed inquiry into the Port's pricing under Part 4 of the Commerce Act will now not proceed.

Customised Price Quality Path – More Flexibility

On 12 November 2015 the CCNZ **published amendments** that provide more flexibility for gas and electricity distributors when applying for a customised price-quality path (CPP).

Draft Amendments to Airport Land Valuation Rules

See 'Notes on Interesting Decisions'.

Input Methodologies Review – Update

On 30 October 2015 the CCNZ **released a process** update paper confirming the key topics and next steps for the input methodologies review.

Electricity Authority

Consultation on Evolving Technologies and Distribution Pricing

On 3 November 2015 the Electricity Authority commenced consultation on the implications of evolving technologies for the pricing of distribution services. Evolving technologies may include electric vehicles, battery storage units, smart appliances, consumer apps and distributed generators (including solar panels). The Electricity Authority believes that distribution pricing structures will need to change in order to maximise the long-term benefits of evolving technologies for consumers.

Notes on Interesting Decisions

Review of Water Pricing in the Australian Capital Territory

On 23 November 2015, the Independent Competition and Regulatory Commission (ICRC) of the Australian Capital Territory (ACT) released an issues paper as the first step in its review of Icon Water's water and sewerage services tariffs. The ICRC argues that, while the current structure of Icon Water's water and sewerage services tariffs 'has served the ACT community well over the last 15 or so years' that in recent years a 'number of questions have been raised about whether improvements could be made to the structure of tariffs'.

The ICRC's issues paper sets out a proposed framework to guide the ICRC's evaluation of the existing tariff structure and potential alternatives. This framework includes an overarching objective (to promote the efficient investment in, and efficient operation and use of, Icon Water's regulated water and sewerage services to maximise the social welfare of the community over the long term) and a set of seven pricing principles (summarised on page 46). The issues paper also canvasses a range of contextual and specific pricing issues that are relevant to this review. Following release of the issues paper, the ICRC is planning to publish three technical papers on specific pricing matters: water demand elasticity, marginal cost pricing and trade waste pricing.

The ICRC is running an open process on all these papers, where stakeholders are free to make submissions on any of the papers at any time before the closing date (1 July 2016) and may make multiple submissions if so desired. The draft report is expected to be released in the second half of 2016, and there will be an opportunity for further comment following the release of the draft report.

Review of Retail Prices and Charges for Gas in New South Wales

On 12 November 2015 the Independent Pricing and Regulatory Tribunal (IPART) of New South Wales (NSW) released an issues paper inviting public comment on its proposed approach to regulating retail gas prices from 1 July 2016. The IPART regulates retail gas prices that the Standard Retailers in NSW – AGL, ActewAGL and Origin Energy – charge residential and small business gas customers who have not signed a market contract.

The NSW Government has asked the IPART to make new pricing agreements and the IPART has invited each of the Standard Retailers to propose a new pricing agreement for 2016-17, including indicative price changes in 2017-18 and 2018-19. These proposals are due in January 2016. The Issues Paper invites public comment on its proposed approach to assess whether the retailer's pricing proposals are reasonable and promote the long-term interests of customers.

A key issue for this review will be to determine efficient wholesale gas costs given the substantial changes occurring in the eastern Australian market. The IPART is particularly interested in stakeholder views about how the recent commencement of liquid natural gas exports from Queensland is affecting wholesale gas costs for a gas retailer.

Further, as part of its review, the IPART will review the competitiveness of the retail gas market to identify and recommend additional measures to strengthen competition in regional areas. The Minister for Industry, Resources and Energy recently announced that the NSW Government will look to deregulate retail gas prices from 1 July 2017 if there is an increase in competition, particularly in regional areas of the state.

The IPART's preliminary view is that it can best meet the objectives by retail gas prices that promote the long-term interest of gas customers. It considers that this encompasses: encouraging the efficient use of gas by setting regulated prices to recover the efficient costs of supply; promoting customer choice and efficient entry and investment in the retail gas market by ensuring regulated retail prices provide an appropriate return, promoting regulatory certainty and transparency in regulatory decision-making, and where possible, reducing any barriers to entry and customer participation in the retail market; and ensuring the financial viability of efficient retailers by taking account of the risks faced by efficient and prudent gas retailers.

Market Value Alternative Use (MVAU) Valuation Methodology for Airport Land – Draft Amendments

On 10 November 2015 the New Zealand Commerce Commission (CCNZ) released draft amendments for consultation on the application of the airport land valuation rules as part of the input methodologies (IMs) review. The IMs are the rules, requirements and processes that apply to economic regulation in New Zealand. Under Part 4 of the Commerce Act, the CCNZ is required to set and apply IMs to regulated electricity lines services (distribution and transmission); gas pipelines (distribution and transmission); and specified airport services.

The IM review is the opportunity to assess whether there are any necessary changes to the IMs to

promote more effectively the long-term benefit of consumers. The review is being undertaken in consultation with all stakeholders. The Commerce Act requires the CCNZ to review each IM within seven years of its date of publication and, after that, at intervals of no more than seven years.

The CCNZ announced in July 2015 that it would accelerate this tranche of work ahead of the main review to provide greater certainty before the next airport price setting events in mid-2017. Accordingly, the CCNZ is now seeking submissions on the draft amendments relating to the application of the market value alternative use (MVAU) valuation methodology for airport land. The matters covered by the draft decision include: the steps involved in determining the MVAU; special assumptions; and practical valuation requirements.

The CCNZ states that transparency and predictability in relation to asset valuation are important characteristics of an effective light-handed regulatory regime. It remains on track to complete this work by February 2016, which will ensure Auckland and Christchurch airports have the ability to prepare updated land valuations in advance of their next price-setting events in 2017. The CCNZ intends to complete the main IM review by December 2016. Review of the application of the airport land valuation rules (the focus of this media release) is being brought forward for completion ahead of the main IM review. This is to provide greater certainty before the next airport price setting events in mid-2017.

Regulatory News

The Club of Regulators at the University Paris-Dauphine

The Club of Regulators is an independent forum inside the Chair Governance and Regulation hosted at the University Paris-Dauphine. The Club brings together regulatory authorities willing to exchange on institutional and organisational challenges which are common to different sectors, with the aim of proposing coherent actions and promoting cooperation at both national and European levels. The Club actively participates in the activities of the Chair Governance and Regulation and benefits from a multidisciplinary platform where regulation stakeholders (regulatory agencies and regulated entities) and experts (legal and economic) meet and engage in constructive debates and exchanges. The originality of this platform lies in bringing together authorities regulating energy (electricity and gas), transport (rail, road, and air), communications and media, online gambling, and health-care.

The Club of Regulators is directed by Eric Brousseau, Professor of Economics and Management, and Director of the Doctoral School at the University Paris-Dauphine. The Club's Board is composed of the Scientific Director and a representative of each member of the Club. **Click here for more information.**

Tasmanian Economic Regulator

On 3 November 2015, the Tasmanian Treasurer, Peter Gutwein, **announced** the appointment of Joe Dimasi as the Tasmanian Economic Regulator. *Inter alia*, Joe Dimasi has served as a commissioner with the ACCC; headed the regulatory division of the ACCC; worked as an economist with the Industry Commission (now Productivity Commission); and held positions in the Victorian public service.

Network is a quarterly publication of the Australian Competition and Consumer Commission for the Utility Regulators Forum. For editorial enquiries please contact Rob Albon (Robert.Albon@accc.gov.au) and for mailing list enquiries please contact Genevieve Pound (Genevieve.Pound@accc.gov.au).