

# The institutional architecture of delegated regulation and its checks and balances

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# Three points

- The role 'substantive' or 'merits' review of regulatory decisions.
- The impact of attempts to narrow the scope of such reviews to focus only on specific 'errors' in regulatory decisions.
- Raise some questions about the appropriateness of: (a) different approaches and (b) forums to undertake such reviews.

# Importance of review/oversight arrangements

- Arguably, the greater the independence of the regulator, the greater the need for some form of oversight/scrutiny of its decisions.
- A review decision is often the final 'output' of a regulatory process in some regulated sectors.
- Getting the balance of oversight 'right' is an important issue in regulation – impacts on incentives of the regulator.
- At the same time, the specific design of appeal arrangements can have major impacts on incentives of regulated companies and users to appeal, as well as the ability of others (e.g.: consumers) to participate in process.
- Matters of institutional design for regulatory decisions are not of marginal interest: can have big impacts on customer bills, and impact the culture and work of a regulatory agency.

# Institutional arrangements for substantive/merits review across jurisdictions

- Variation in how review bodies are organized and where they are situated:
  - US: generally review function in first instance is internally embedded within the regulatory commission.
  - UK: Competition Commission (CC) for price control decisions (soon to be CMA); the Competition Appeal Tribunal (CAT) for some (non-price control) communications decisions and review of regulatory disputes, and competition law matters.
  - In Australia: regulatory decisions and (some) competition decisions to the Australian Competition Tribunal (ACT).
- Also diversity in the task they are asked to undertake:
  - In US: conduct a trial, hear evidence and produce a record, on which a recommendation is made.
  - In UK: CC applies a public interest standard for regulatory decisions; except for telecoms decisions (see below).
  - In Australia: generally engage in merits review in regulated sectors: *“is a decision the correct or preferable one”*. However, for telecoms, judicial review only since Jan. 2011, and in energy a ‘limited’ form of merits review since 2008.

# Review design and incentives: two case studies

- Two recent examples of how design of review arrangements can impact on the incentives of parties, and the level of appeal activity.
- **Australia: 'limited' merits review in energy**
  - Motivated by concerns that 'full' merits review would be disproportionate and costly – limit review to 'errors'.
  - Significant increase in appeal activity: in three years  $\approx$  £2.1 billion transferred from consumers to companies.
  - A one-way bet: appellant can exert an influence on review agenda, introduces a bias into process.
- **UK: Communications**
  - Significant levels of appeal activity, particularly compared to other sectors.
  - In price control matters, a focus on correction of 'errors' identified in reference questions, rather than on a review of the whole decision.
  - What happens if the CC identifies another fault/error in the decision?

## Some observations on the case studies

- i. Distinction between binary decisions (competition law infringements) and price control decisions.
- ii. Ambiguity about the task: adversarial or inquisitorial/administrative.
- iii. Aspirations for tribunals and observed practice.
- iv. Participation in the review process.
- v. Specialisation and the composition of the review body.

# Concluding comments

- Appropriate to have checks and balances on regulatory decision making.
  - Judicial review alone unlikely to be enough for regulatory decisions: an oversight gap given substantial powers of the regulator and importance of decisions
- But, getting balance of substantive review ‘right’ is difficult.
  - Focus on specific ‘errors’ likely to result in high levels of appeal activity.
  - What does the relatively low level of appeal activity in (non-telcommunications) price control decisions tell us about current U.K. arrangements?
- Given nature of the task, consideration needs to be given to the most suitable approach (adversarial/administrative) and forum (tribunals/administrative body).
  - Adversarial, court-like tribunal processes may be ill-suited to the task, which can be one of investigation/discovery of the facts in pursuit of specific policy objectives.
  - Complex decisions, involving many interrelated judgments: if allow parties to only appeal those that are not in their favour, then unsurprising that see this result.