
The draft access undertaking decision by the Queensland Competition Authority (QCA) on Dalrymple Bay Coal Terminal offers a telling insight into the deepening problems for infrastructure management in Australia.

The regulatory framework has no release value for the conflict it generates. This is a big picture concern for Prime Infrastructure, the QCA and all stakeholders. Arguing over the “correct” cost of capital is futile, while ever we continue to deny the fundamental flaw in the broader process.

The real (and only) value of regulation lies in asking the questions that competitive firms constantly face. Can costs come down? What is a reasonable rate of return, given the risks? And are my customers satisfied? This approach has had success in the public sector where tangible gains could be had from changing a culture that was “commercial” issues as purely “secondary”.

Once substantial inefficiencies have been addressed, however, regulation becomes an unavoidable liability. It can’t mandate efficiency. Thinking otherwise is utter fallacy.¹

The regulatory edifice embodies a total bluff. The QCA and other regulators can lead the infrastructure horse to water, but it cannot make it drink. Instead of recognising such, we deal with this dilemma by making matters worse – the regulator arrives at what it thinks is reasonable. This is a complete violation of the key principles upon which the regime is based.

Free market economics informs us that a third party cannot adequately second guess the various quantitative and qualitative trade-offs that arise when a buyer and seller come together. There is no complete formula for efficiency – it has a dynamic element that defies definition. Act according to this realisation and the “invisible hand” will ensure we all prosper.

Whether one believes this or not, the policy paradigm adopted in Australia over the last two decades is based on such a philosophy. The momentum that created National Competition Policy – and the economic regulatory framework that grew from it

¹ The statesman who should attempt to direct private people in what manner they ought to employ their capitals would not only load himself with a most unnecessary attention, but assume an authority which could safely be trusted, not only to no single person, but to no council or senate whatever, and which would nowhere be so dangerous as in the hands of a man which had folly and presumption enough to fancy himself fit to exercise it (*The Wealth of Nations*, Book IV, Chapter II).

– stems from a heart-felt belief that efficiency and individual freedom are one and the same.

Naturally, there is no point attempting to define such a claim – how does one define what is said to be beyond definition? Instead, the policy agenda has sought to identify all that constrained freedom, remove it, and then enjoy the proceeds.

Infrastructure has become the major hitch in closing-out on this leap of faith.

Its foundational (or “essential”) nature has sponsored compromise. Infrastructure has been too important for *laissez faire*. Thus, regulators have sought to do what has already been stated cannot be done.

Gut feel says there is something peculiar about regulating an asset managed by a listed company. This is not about ridding a former monopoly of technical inefficiencies. QCA is attempting to second guess the “right” price or total revenue flow from an “efficient” operator. But what is efficient? What is market power?

Interestingly, Hilmer hinted at this dilemma. The Committee wanted ministerial-level access principles to be exercised only as a last resort via binding arbitration. Appeals would be limited to matters of law. It did not favour the creation of independent regulators setting detailed access terms and conditions based on the optimisation of various competing interests.

Part of the reason why regulation has to be a pretence – it has no adequately defined target – is inferred in the following: “The central conundrum in addressing the problem of misuse of market power is that the problem is not well defined nor apparently amenable to clear definition. Even if particular types of conduct can be named it does not seem possible to define them, or in circumstances in which they should be treated as objectionable, with any great precision. ... The challenge is to provide a system which can distinguish between desirable and undesirable activity while providing an acceptable level of business certainty”.

Like any good economist, the Committee played its part in the prodigious sham by assuming the problem away: “In addressing this challenge, the Committee starts from the position that there is already in place a regime which provides a basis for making the appropriate distinctions”.

This unchallenged assumption has come home to roost. Of course, the dilemma is now much harder to spot amidst the frustration and bickering, and the institutionalised perception that regulation can be our economic saviour.

The leading of previously inefficient government monopolies to water has created an expectation of thirst-quenching efficiency for us all. We romanticise: maybe regulation can force infrastructure managers to drink? This is never going to happen – and economists are failing the community by perpetuating untruths about what regulation can and cannot ultimately do. The simulated “drinking” by the QCA (ie setting its own access terms and conditions) is an act of desperation.

Meanwhile, the previous success of reform has heightened the economic importance of infrastructure. It’s ironic: we now have too much at stake to contemplate commercial life without the fall-back of regulatory intervention.

These dynamics are preventing the debate from being elevated to where it needs to be. Any suggestion that regulation is no longer productive is immediately labelled extremist or as having vested interests. If issues relating to the efficacy of regulation are tackled by Prime Infrastructure, they will likely be summarily dismissed, on the cynical basis that such compromises were factored into the acquisition price. Addressing the possibility of “sour grapes” or “windfall” commercial gain is more important than getting things right.

Even the once ideologically-sound Productivity Commission has yielded – perpetuating the mistaken belief that violating principles can in some way provide for a sustainable equilibrium. It recommends balancing items for the regulatory equation, like a “truncation premium”, while passing over the fundamentals. Conceding that regulators are often wrong is still short of the truth – they can never be proven right or wrong, in an empirical sense. The resulting unresolvable arguments are placing regulation at risk of being a net cost to the community because it distracts stakeholders from the more basic problems.

So, is Prime Infrastructure intent on screwing its port users? A fair question, to be sure.

Whatever the case, there is a more vital consideration: is the fear that often accompanies such an inquisition blinding us to the dreaded cost of institutionalising bad faith? For greed is certainly other than a good thing, but what of the dead-weight of inescapable paternalism?

Such matters should be reconsidered in the context of the market-based principles that have already achieved so much. It may well be time infrastructure owners had the opportunity to show the commercial maturity necessary for Australia to have a truly efficient economy.

The QCA should be asking itself if it has made provision for such an outcome or whether it is intent on continuing to feed the conflict by refusing to acknowledge the fundamental limitations of the regulatory process.