

# A Rejoinder to Biggar

Henry Ergas<sup>1</sup>

There is much to agree with in Darryl Biggar's comments on my article. Nonetheless, it does demand the examination of a number of issues.

First of all, it is illusory to think preventing firms from recouping investments prudently incurred can protect the interests of consumers — the opposite is true. For example, if the regulator, confronted with an adverse cost shock, shifts the burden of that shock on to investors in the regulated business, thus stranding investments prudently made, the effect is simply to increase the risk premium those investors will demand in future. In the long run, that higher premium must be reflected in increased supply costs and so in prices or subsidies, affecting consumers, taxpayers or both.

Second, Biggar's suggestion that creating an entity that acts as a consumer representative solves any of the contracting problems I referred to seems inconsistent with both analysis and experience. After all, such an entity still has to identify preferences and aggregate them in a meaningful way; why merely having such a body should make those tasks more tractable is unclear. Moreover, there are obvious issues of governance associated with such entities. The US experience is that they are often captured by self-styled consumer advocates, whose focus ranges from promoting 'green' schemes (despite their higher costs) to a naïve form of populism. I would suggest that has also been the Australian experience with consumer advocates in telecommunications.

Third, just as regulators are not like central banks, so regulators are neither courts nor judges, for reasons explored in Ergas (2009). Precisely because the regulatory task is relatively loosely defined and relies on the collection and analysis of a wide range of information (and so requires a permanent bureaucracy), it cannot be shoehorned into the constraints we impose on courts.

Those constraints, which minimise the opportunities for courts to be 'captured' or to themselves engage in rent-seeking, include severe restrictions on the manner in which information is presented (embodied in the law of evidence and in the rules of proceeding), the nature of the interaction between the court and the parties and the complex structure of appeals. In contrast, economic regulators are generally subject only to the fairly permissive requirements of

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<sup>1</sup> The University of Wollongong and Deloitte Access Economics; [ergas.henry@gmail.com](mailto:ergas.henry@gmail.com).

administrative law; especially when the legislation under which they operate is also relatively permissive (in terms of the goals it sets them and the instruments it provides), that accentuates the risks of time-inconsistency I stress in my article.

As a result, analogising regulators to courts is unhelpful. Indeed, the differences between courts and regulators — and the associated dangers of regulators acting in ways that are ultimately harmful — are precisely an argument for ensuring regulatory decisions are subject to adequate appeals mechanisms. In contrast, the ACCC has long advocated paring back such mechanisms, as I note in my article.

In short, when Johnny chooses to be a regulator, he is not choosing to be a judge, just as he is not choosing to be a policeman or a prosecutor. What he is choosing is to exercise a role that is of great importance to efficiency — and hence needs to be carefully designed. The essence of my article is that we are still struggling to do so.

## Reference

Ergas, H. 2009, 'Error and Design: Economics in (and some Economics of) the Australian Competition Tribunal', *Agenda: A Journal of Policy Analysis and Reform* 16(3): 71–91.