

Boundary between Antitrust and Regulation

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1. Different approaches to a common goal

- **End goal of antitrust law is to have efficient (and low) prices and to encourage innovation**
 - Antitrust law protects the process of competition
 - Enforcement is by private parties (or the Commerce Commission) through the Courts
- **Regulation shares the same goal**
 - Attempts to achieve this end directly, by imposing outcomes
 - Rules set by regulatory agencies (which may be more or less independent from the politicians) and may be rights of appeal to the Courts

2. Strengths and weaknesses of antitrust

Strengths of antitrust

- 1. Facilitates competition, reduces collusion and reduces abuse of market power to protect incumbency**
 - through the Courts and through culture change (good awareness of competition issues)

- 2. Courts robustly independent**
 - little risk of capture by interest groups

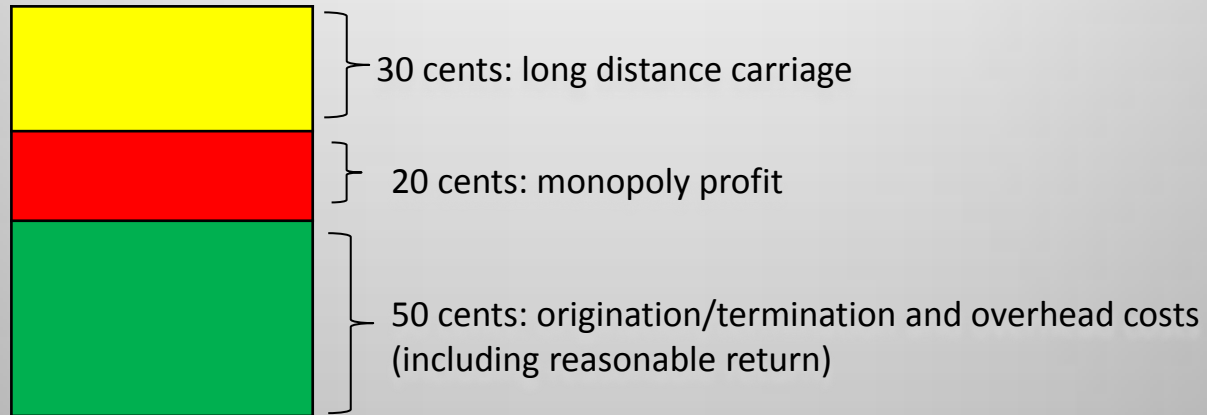
Weaknesses of antitrust

- 1. Not well suited to setting prices or terms of access (eg for a vertically integrated business which controls an upstream bottleneck facility but which could be subject to competition downstream)**
- 2. Lack of agenda and co-ordination of different industry issues**
- 3. Can be slow and expensive and tends to be backward looking**

Examples: Light-handed regulation and the Courts ...

- ***Telecom v Clear* (1994, Privy Council)**

- Interconnection dispute



- Baumol-Willig rule
- Part IV is appropriate remedy, not s36

- **Although contrast ...**
- ***"DataTails" (Commerce Commission v Telecom, 2009, High Court)***
 - Unflinching application of ECPR pricing principles
 - Court acting as "after the fact" price regulator

3. Strengths and weakness of regulation

Strengths of regulation

1. Institutional capability to deal with pricing issues and terms of access
 - industry knowledge, economic expertise, ability to set an agenda etc

Weaknesses of regulation

- 1. Industry focuses on the regulatory game (ie rent seeking), not on competition and innovation**
- 2. Fights over the details**

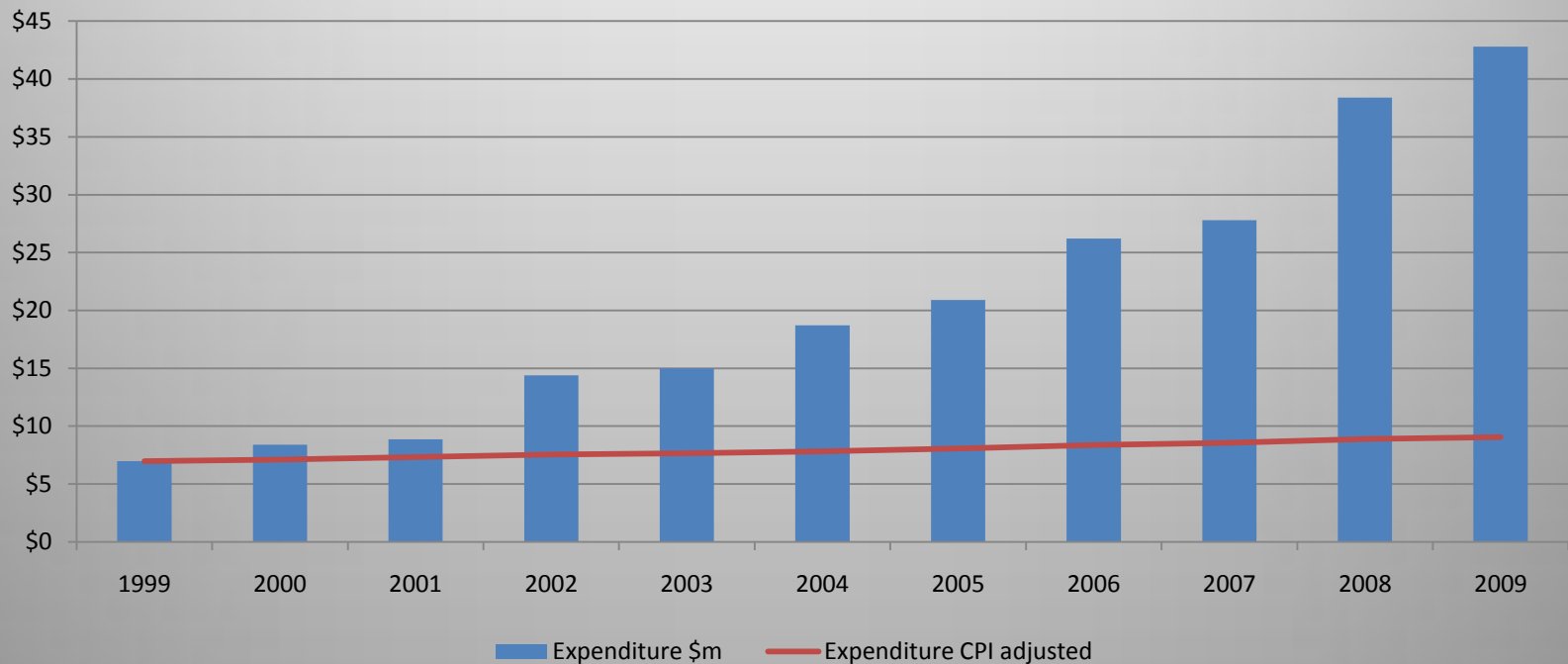
Example: Raw Milk Supply Regulations --> disputes over costs of capital, transportation costs and the meaning of independent processor

- 3. May deter investment (truncated returns) or entrench ways of doing things (eg regulating landline broadband may stall mobile broadband)**
- 4. Risk of capture by industry over time (US experience)**

Regulation = Large overhead for a small country

Commerce Commission has become price regulator for electricity and gas distribution and transmission ...

Commerce Commission Expenditure



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4. Enlightened regulation (and alternatives to regulation)

1. Good regulation means ...

- Surgical, least intervention necessary, reversible and testable**
- Example: Electricity lines businesses -- do we need a full blown process or, given asymmetric risks, just a quick and generous way of setting the cost of capital and regulated asset base**

2. Alternatives to regulation

- Example: Consumer co-operatives**