SUBMISSION TO THE COMPETITION POLICY REVIEW*

Governance of the ACCC

This submission deals with recommendations 47 and 48 of the Draft report of the Competition Policy Review which are concerned with the ACCC governance and media conduct.

The Draft Report canvasses two options to improve ACCC governance. One option is to replace the current Commission with a Board comprising executive and non-executive members with either an executive or non-executive chair. The other is to add an advisory Board chaired by the Chairman of the ACCC but would not have decision making powers. It also recommends a media code of conduct for the ACCC.

The report does not specify the problems that it is trying to address but notes that the Commissioners and Chairman of the ACCC, being appointed on a full time basis effectively perform an executive role and governance could benefit from individuals who do not have day to day responsibilities and who could bring an outside perspective to the organisation.

We consider the issue of governance critical in ensuring an effective implementation of the competition, consumer protection and regulatory laws that the ACCC administers. We believe that while the current governance arrangements of the ACCC work reasonably effectively, they can and should be improved.

We support recommendation 48 which proposes a media code of conduct for the ACCC. As recognised by the Draft Report a media code of conduct was also proposed by the Dawson Inquiry.

As a public body the ACCC needs to be open and transparent. Effective use of the media is important in informing the community of its activities and to raise awareness of competition and consumer issues. However, as a law enforcement agency use of the media to publicise investigations or to discuss litigation which is underway is not in our view acceptable practice and has drawn criticism in the past, including from the courts.

Ensure the Roles and Functions are Appropriate

The breadth of functions from competition laws to consumer protection to utility regulation makes the task of managing the ACCC very complex. It is difficult for individual Commissioners to all be able to have the requisite background and expertise to deal with the spectrum of matters over which the ACCC has to make judgement. It is challenging to set priorities and to decide where to deploy resources over such a broad array of activities particularly where some issues may be highly visible and topical while others which may be very significant for the economy as a whole may not be as visible or get the same level of attention from stakeholders and hence may not register as highly in the order of priorities.

This has been managed by the ACCC by having lead Commissioners in particular areas such as enforcement, mergers, regulation and so on. It has also seen a body of work on energy regulation being undertaken by a specialist group within the ACCC. These solutions are not satisfactory as they tend to blur the separation of the decision making functions of the Commissioners and the operational activities of the organisation. In addition the role of Executive Chairman where the powers of the CEO and Chairman are vested in the one role does not lend itself to good governance and can significantly influence the way the organisation operates.

We believe that recommendation 46 to establish a separate utility regulator will assist significantly in achieving a more appropriate set of functions. We agree with the draft report which notes that the culture and analytical approach required to regulate an industry differs from those typically characteristic of a competition enforcement agency.

Advisory Boards

We support reform in this area but do not believe that either of the options suggested in the Draft Report provide the answer. An Advisory Board is not likely to be effective. The Commission already has a number of advisory bodies and an additional Advisory Board is only likely to lead to a reorganisation of those existing advisory activities.

The second option would replace the Commission with a governing Board which has some members full time undertaking the decisions of the Commission while others are part time and would not be involved in the decision making. A limited version of this model has been tried in the past where a number of Associate Commissioners were appointed and were involved in Commission meetings on a rotating basis. That experience was not successful and was dropped. We are not convinced that either option is an

appropriate model for a regulator that is making significant regulatory and enforcement decisions that impact on individuals and companies.

Appropriate Institutional Design

In our view the issue of governance can be better dealt with through appropriate institutional design. The competition regulator should have clear and appropriate functions and objectives. The functions need to be coherent and not so broad that focus is lost.

The ACCC is a regulator and law enforcement agency. Decision making needs to be independent, it needs to be transparent and it should be clear who is making the decisions and who is accountable for those decisions. It is appropriate that the decision makers are appointed by Government. However, decision makers should be a deliberative body. Members should sit apart from the staff of the Commission and should not be involved in the day to day operations of the Commission. This issue was addressed by the Monash Business Policy Forum in its paper on the design of regulatory institutions.[1]

> Australia has experience of regulators operating under a range of different operational structures. These include regulatory agencies where commissioners act as hands-on executive managers, to models where commissioners act more like a board of directors, providing arms-length oversight and review of proposals developed by the executive.
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> If commissioners are intimately involved with the development of specific regulatory decisions then those same commissioners cannot provide objective oversight for these decisions. Agencies where commissioners are intimately involved in day-to-day administration and the progression of particular projects in effect have commissioners simply as senior staff members. While they may have final say on an agency's decision, it is unlikely that they will be able to separate out their roles in formulating the decision from their evaluation of the merits of the decision. In our opinion, such a structure undermines the role of commissioners. At a minimum, the decisions of such agencies need to be subject to fulsome merits review.
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> In contrast, commissioners may act as a deliberative body, reviewing proposed decisions but at arms-length to day-to-day operations that are managed through a CEO and senior staff. In such a situation,

[1] "Rationalising rustic regulators: How Australia's national economic regulators should be reorganised", July 11 2014, available at: http://www.buseco.monash.edu.au/assets/documents/mbpf-regulation-final.pdf

commissioners have an oversight role and merits review of decisions is automatic, through the Commission. The commissioners can quickly refer inconsistencies, lapses of process and errors back to the agency staff. However, the commissioners themselves are able to sit outside the specifics of any decision and to apply rigorous oversight.

In our opinion, an agency where commissioners take an oversight role is likely to be more effective than alternative agency models. It reduces the potential for both capture and agency slack as the Commission can review decisions for both capture and poor quality work. It is likely to improve regulatory decision making, as commissioners will expect alternative views to be presented. Such a regulator is unlikely to require a process of merits review. Effectively, the role of the commissioners is to carry out such a review within the agency.

Having most (or all) commissioner roles as part-time positions enhances the deliberative role of commissioners. Part-time commissioners will necessarily bring an outside perspective to their roles and are less likely to be drawn into the development of specific regulatory decisions.

It might be tempting to consider a hybrid model, for example, where some commissioners are full time and some part time, or where commissioners (whether full or part time) specialise and become involved in specific regulatory functions. Unfortunately, such models conflict with the oversight role of commissioners.

For example, if a chief commissioner is also CEO, it becomes difficult for the other commissioners to oppose a view which has been developed by the staff under the direction of the chief commissioner. The same would apply if different commissioners took responsibility for policy in particular areas; a temptation that part-time commissioners would find easier to resist. Full time commissioners are likely to be drawn into day-to-day agency matters. For the commissioners to act as a board and sit in review, the members must refrain from trying to run the agency or its business.

Summary

In summary we agree that it is desirable to examine and improve the governance arrangements for the ACCC. (We believe that these suggestions could apply to other regulators as well). We do not believe that the proposals

in the draft report will be effective. In our view the objective of improved governance can be better achieved through the following.

1. Ensure that the organisation is properly focussed and has appropriate roles and functions.
2. Decision making should be undertaken by members appointed by Government.
3. Members should focus on the public interest and not represent any particular groups.
4. Decision makers should sit as a deliberative body and should not be involved in the day to day operation of the organisation.
5. Members should not be full time.
6. The role of the Chairman should be separate from that of the CEO and should be part time
7. A media code of conduct should be established.

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