

CHAPTER 11: ADMINISTRATION OF THE ACT

Background

The ACCC is an independent statutory authority established in 1995 by the merger of the former Trade Practices Commission and the Prices Surveillance Authority. It exercises significant powers under the Act, the object of which is to 'enhance the welfare of Australians through the promotion of competition and fair trading and provision for consumer protection'. It has an annual budget of approximately \$62 million and staff of approximately 450 persons spread throughout Australia. It has offices in each capital city and in Townsville and Tamworth.

The ACCC comprises a chairperson and such number of other commissioners as are appointed from time to time. Associate commissioners may be appointed. Commissioners are appointed for a term not exceeding five years, but are eligible for re-appointment. A person who is, or is to be, a commissioner may be appointed as deputy chairperson. The ACCC currently has five full-time commissioners, five part-time associate commissioners and ten ex officio associate commissioners. The chairperson, or the deputy chairperson in the chairperson's absence, presides at a meeting of the ACCC. Three commissioners of the ACCC form a quorum.

The ACCC has established committees in relation to enforcement, mergers, energy, and transport to facilitate its decision-making process. The enforcement and mergers committees meet weekly. The ACCC also has a number of consultative committees to maintain contact with industry, consumers and government.

The ACCC produces an annual report which is tabled in the Parliament and is subject to review by the House of Representatives Standing Committee on Economics, Finance and Public Administration. The ACCC's financial operations are audited by the Auditor-General and it is subjected to scrutiny by other parliamentary committees from time to time. Various determinations of the ACCC are subject to merit review by the Tribunal. Enforcement of the Act is by way of proceedings in the Federal Court.

Issues

The Committee received a number of submissions concerning the corporate governance of the ACCC.

Some submissions advocated the creation of a board to oversee the ACCC's performance of its functions. An alternative proposal was the establishment of a Board of Competition, similar to the recently created Board of Taxation. The Board of Competition would not be involved in decisions by the ACCC, but would provide advice to the Government on the development of competition regulation and to the ACCC on its administration. The Board of Competition would, it was suggested, monitor the ACCC's performance against a charter for the administration of competition regulation and help to increase the ACCC's understanding of consumer and business perspectives.

The appointment of an Inspector-General of Competition to complement the Board of Competition was also proposed. Some saw the role of this office as the handling of complaints in a fashion similar to that of the Ombudsman, but confined to matters of competition. Others saw the Inspector-General as dealing with systemic issues in the area of competition and making recommendations to the Treasurer or the ACCC.

It was also submitted that a dedicated Joint Parliamentary Committee should undertake parliamentary scrutiny of the ACCC.

Wilkinson Review

The Government has referred some of the recommendations of *The Review of the Impact of Part IV of the Trade Practices Act 1974 on the recruitment and retention of medical practitioners in rural and regional Australia* to the Committee for consideration.

Of relevance to the administration of the Act is Recommendation 6 of the Wilkinson Review which recommends that:

- '(a) to increase public confidence, the ACCC review its internal administrative, investigative and review processes to ensure that they are transparent and accessible to parties affected by ACCC action; and
- (b) the ACCC establish appropriate processes to ensure that the medical profession is explicitly aware of the internal and external avenues available for lodging complaints about the ACCC's conduct of investigations, and for seeking the review of ACCC decisions.'

The report recognises that these recommendations may require a changed emphasis in regard to staff training and organisational structure within the ACCC.

In Recommendation 12, the Wilkinson Review recommended that the ACCC establish a pre-formal authorisation assessment process to facilitate informal dialogue with professions and potential applicants about current or proposed arrangements, which potentially fall within the ambit of the Act and therefore may require authorisation.¹

Analysis

The Committee notes the announcement by the Prime Minister of a review of the corporate governance of Commonwealth statutory authorities and office holders. Such a review may conclude that fundamental change is needed as a matter of general policy, such as the substitution of boards without executive functions for commissions, which currently execute their own decisions. Such a change would, in the case of the ACCC, mean replacing the ACCC with a board structure rather than placing a board above the existing structure as proposed in submissions to the Committee. However, confining its attention to the ACCC, the Committee concluded that such a fundamental change is not warranted although the Committee is not opposed to a board – as opposed to a commission – if it is ultimately recommended as a matter of general policy. The Committee has directed its attention to the problems identified in this review and the way in which they might be solved by changes within the existing general framework of the ACCC.

The way in which the ACCC administers the Act claimed the attention of many of those who made submissions to the Committee to a greater degree than the provisions of the Act itself. Perhaps this is not surprising because the powers of the ACCC as a regulator are considerable and, in the exercise of those powers, the ACCC has made a significant impact on the conduct of business in this country and upon the economy. The ACCC has been commendably vigorous in discharging its responsibilities under the Act, particularly with regard to the dissemination of information to interested persons for their guidance upon the carrying out of its functions and the exercise of its powers. Nevertheless, there are some concerns as indicated in the Wilkinson report and submissions made to the Committee. The ACCC's use of the media and the manner in which it exercises its powers under section 155 are dealt with in Chapters 12 and 13 respectively. There remains the general question of the accountability of the ACCC and its relationship with the parties with whom it must deal.

¹ See Chapter 6: Authorisation.

Corporate governance

The Committee sees merit in the proposal that a dedicated Joint Parliamentary Committee should undertake parliamentary scrutiny of the ACCC. The Joint Committee would develop a special understanding of the responsibilities of the ACCC and of the concerns of the parties with whom it deals. This may allow some rationalisation of the number of appearances of the ACCC before other Parliamentary Committees without decreasing scrutiny of its administration of the Act. This proposal is, of course, a matter for the Parliament to consider.

The Committee does not support the creation of a board or the appointment of an Inspector-General to oversee the performance by the ACCC of its functions. The creation of a supervisory board would introduce an additional and uncertain layer of control over the management of the ACCC and the Committee is not persuaded that this would increase the ACCC's efficiency, or accountability, or offer the best means of responding to the questions raised in relation to the ACCC's administration. If more fundamental reform of the ACCC's governance arrangements were to be undertaken, the Committee would prefer to see the ACCC replaced by a board, as opposed to a commission, rather than see a board installed above it.

The introduction of a Board of Competition to advise the Government on competition regulation would not require a fundamental change to the corporate governance of the ACCC. If it were to operate in the manner of the Board of Taxation, it would essentially be an adviser to the Treasurer on policy matters. Such a role is warranted in the case of the Board of Taxation because there is a considerable volume of taxation legislation annually in relation to which the Government can gain valuable input from a broad range of perspectives. There is not, however, such a volume of amendments to competition law as to warrant a permanent advisory body to the Treasurer on policy matters. The greater need is for feedback to the ACCC on its administration of the Act.

Similarly, the Committee rejects the proposal to appoint an Inspector-General. The objectives of such an appointment can, it believes, be achieved without the creation of another layer of administration.

Improved consultation

The ACCC has established a number of committees through which it consults business, consumers and other interests. These include:

- a comprehensive consultative committee which meets bi-annually and comprises representatives from business, consumers, government departments and the professions;
- a consumer committee which meets quarterly;
- a small business advisory committee which meets every six months;
- a utility regulators forum which meets three times a year; and
- a recently established regional consultative committee.

The Committee is unable to comment generally on the extent to which the special purpose committees successfully perform their functions. However, it was apparent from the submissions made to the Committee that the comprehensive consultative committee is an ineffective body which serves largely to enable the ACCC to report on its current activities. It appears to offer little, if anything, by way of criticism or suggestion. It is chaired by the chairperson of the ACCC. The representatives that are sent to its meetings are not at the highest level, especially those from business, and some attend only irregularly. It makes no report on its activities.

The Committee believes that the consultative committee could provide the means to make the ACCC more immediately accountable, to enable useful discussion of problems encountered in the administration of the Act and to provide a source of informed advice to the ACCC where appropriate. However, the nature of the consultative committee would need to be radically changed before it could do these things.

The consultative committee should be given statutory footing. The chairperson of the committee should be appointed by the Treasurer and should be someone who is impartial and is not limited to any particular group or interest. The members of the committee should be selected by the chairperson of the committee in consultation with the ACCC and might represent large and small business, consumers, the professions and government. However, the committee membership should be kept to a minimum so that the committee does not become unwieldy. It would be incumbent upon the various groups, especially business, to ensure that their representatives were of the highest order. The chairperson of the committee would set the agenda and the committee would be required to report to Parliament each year by way of a dedicated separate chapter in the ACCC's annual report.

The function of the committee would be to advise the ACCC on the administration of the Act rather than advise government on the policy of the Act. Accordingly, the ACCC should provide secretariat services to the committee. The existence of the committee and its functions should be publicised. The representation on the committee should facilitate dialogue between the ACCC and interested parties. The success of such a consultative committee would rest with its chairperson and its members. It would therefore be important for senior business representatives to be prepared to join the committee and participate in discharging its agenda. The committee would meet as necessary, but at least quarterly.

A reconstituted consultative committee would further enhance communication between the ACCC and small business. The Committee notes the current constructive consultation arrangements between small business and the ACCC through the Small Business Advisory Committee. There is also a commissioner appointed with specific responsibilities for small business. The Committee does not believe the appointment of an additional small business commissioner is necessary.

Charter of competition regulation

A number of submissions also suggested the introduction of a Charter of Competition Regulation which would set out the framework and processes within which competition regulation should be administered. In addition, some submissions also suggested specific guidance should be included on the broad principles to be followed by the ACCC in the administration of the Act. The Committee does not see any value in complicating the existing section 2 of the Act by adding additional objectives. Further, the Committee does not support, in general terms, a charter of competition regulation. However, guidelines on administration in specific areas already exist and will need to be amplified in certain areas if any changes are made to the Act. The consultative committee could play an important role in any amendments to such guidelines. In addition, as noted later in this chapter, the Committee supports a review of the ACCC service charter.

Resolution of individual complaints

The consultative committee would deal with matters of administrative policy rather than individual complaints. For example, it is suggested that the consultative committee should play a large part in the development of codes of conduct, such as a media code of conduct, and the various guidelines, such as the mergers guidelines. Individual complaints would have to be dealt with

separately. Currently, they are resolved through informal internal processes or through the Commonwealth Ombudsman. Many submissions were to the effect that the Ombudsman's wide range of responsibilities made that office seem an inaccessible mechanism for dealing with trade practices complaints. In 2001-02, the Ombudsman finalised 32 complaints regarding the ACCC of which 13 were investigated. Of this 13, one was found to involve an arguable agency defect.

The Committee is of the view that the ACCC's informal processes for dealing with complaints should be given a degree of formality by the appointment of an associate commissioner to deal with them. That role is now undertaken by the Chief Executive Officer. The appointment of an Associate Commissioner for Complaints and the procedure for making and dealing with complaints should be made known and would provide some assurance that complaints would be handled with a degree of independence from executive management. This would also address issues raised in the recommendations of the Wilkinson Review. The Associate Commissioner for Complaints should also report to Parliament through the ACCC's annual report. It would be appropriate for systemic administrative issues observed by the Associate Commissioner for Complaints to be considered by the consultative committee.

Consultation with consumers

Another way in which consultation might be enhanced is by the introduction of a process similar to the 'super-complaints' procedure that is being established in the United Kingdom in relation to its competition law regime. Under this process, designated consumer bodies in the United Kingdom will be able to make a 'super-complaint' where they consider that certain features of the market, such as market structure or the anti-competitive conduct of firms operating within it, may be significantly harming consumers.²

The market in question may be regional, national or supranational (which includes the United Kingdom). The United Kingdom Office of Fair Trading will be obliged to respond publicly within 90 days as to whether it intends to take action. The response by the Office of Fair Trading must state reasons for its response and the proposed action it may take. Guidelines will be published to assist consumer bodies in framing a reasoned case in connection with a complaint.

² Clause 11 of the *Enterprise Act 2002* (United Kingdom).

At present, there are a number of ways in which the Australian Act is administered with regard to consumers. The Act requires that there be a designated commissioner for consumer matters. A consumer committee meets quarterly to provide a forum in which consumer issues can be raised with the ACCC. The Committee was advised that the consumer committee is working effectively. In its submission, the Australian Consumers Association praised the ACCC for transparency and making consumers 'far more' aware of their rights. However, the Government may care to observe the operation of the new 'super-complaints' procedure in the United Kingdom to see if there would be benefit in introducing such a mechanism in Australia.

Sustaining the ACCC's capacity

The quality of the ACCC's management and staff is critical to its performance and the effective administration of the Act. The Committee notes that the appointment of persons at commissioner level for two terms appears now to be a standard approach for public authorities in the United Kingdom. The limitation of two terms in the United Kingdom is thought to safeguard against complacency while providing an opportunity for greater ongoing review of the organisation and the board.³ The Committee considers that commissioners of the ACCC, particularly the chairperson, should not ordinarily be appointed beyond a maximum of two terms.

The quality of the Commissioners and staff of the ACCC appears to the Committee to have been and to remain high. However, achieving this has not been without difficulty. For example, there has been a vacancy in the position of deputy chairperson for over two years.

It is desirable that the ACCC be able to draw on persons with recent business and legal experience gained from outside the ACCC. The Government's ability to attract suitable new candidates for appointment to the position of commissioner depends to a large extent on the level of remuneration it is able to offer. At present that is set by the Remuneration Tribunal and offers little enticement to suitable persons from the private sector to join the ACCC, even for a limited period. The Committee believes that consideration should be given to an improved means of attracting candidates of the requisite quality. There are, of course, many advantages in the form of learning and experience to be gained by persons from the private sector during even a limited period with the ACCC.

³ Committee on Standards in Public Life (United Kingdom) 1996, *Second Report*, Chairman Lord Nolan, p. 53 and p. 103.

The ACCC could assist the development of its professional staff by seeking to expose them to experience outside the ACCC. This would build on existing arrangements for exchanges with other regulators and might be encouraged by the development of staff exchanges with key groups with which it interacts. This would be consistent with the practice of United States regulators. The appointment of visiting academic experts for temporary periods, as is done in Canada, may also assist staff development.

Review of service charter

The ACCC should also review its service charter in the light of the issues that have been raised before the Committee concerning administration and corporate governance, and the relevant recommendations of the Wilkinson Review. It would be appropriate for the consultative committee to contribute to such a review in order that the concerns of interested parties might be taken into account.

Use of ACCC resources

Given the competing demands upon the ACCC it must seek to make the best use of its resources. This includes making decisions about the enforcement of, and compliance with, the Act. The ACCC takes the following factors into account in considering whether to take action to enforce the Act:

- apparent blatant disregard of the law;
- any history of previous contraventions of the law, including overseas contraventions;
- significant public detriment and/or a significant number of complaints;
- potential for action to have a worthwhile educative or deterrent effect;
- whether the matter involves a significant new market issue; and
- whether the likely outcome justifies the use of resources.

In addition, the ACCC has specific priorities in relation to anti-competitive conduct. Irrespective of the industry or market involved, the ACCC is likely to be most concerned with the following forms of anti-competitive conduct:

- anti-competitive agreements, particularly in relation to price-fixing and primary boycotts;

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- mergers which would, or would be likely to, substantially lessen competition in a substantial market;
- misuse of market power (especially conduct that inhibits structural reform, focuses on emerging markets/competition or that may stifle the development of innovation and small business);
- resale price maintenance imposed by major suppliers or induced by major customers;
- exclusive dealing that significantly affects consumers or business; and
- secondary boycott conduct that has a major detrimental community impact.

In its submission the ACCC states in relation to small business:

‘... the Commission’s enforcement priorities are focused on establishing relevant legal precedent and matters involving relationships with marked disparity in bargaining power or market power (for example, landlord and tenant or franchisor and franchisee relationships). These issues may be considered under section 46 (misuse of market power), or in some cases Part IVA (unconscionable conduct). The Franchising Code under Part IVB is also relevant.’

The Committee has already expressed the view that the establishment of legal precedent is important at this relatively early stage in the interpretation of the Act. It is inevitable that some parties will question the priority the ACCC accords to its various functions. A number of small business interests expressed concern about the ACCC’s failure to investigate particular matters of relevance to them. In part, this underlines the confidence of small business in the capacity of the ACCC to assist it. The mere fact that the ACCC is making inquiries may help to resolve some problems and encourage compliance with the Act.

Conclusions

- Consideration should be given to the establishment of a single Joint Parliamentary Committee to scrutinise the ACCC’s administration of the Act.
- It would not be desirable to establish a board above the ACCC to oversee the functioning of the ACCC or to appoint an Inspector-General of Competition.

- Reform to meet the problems identified in the review can be most appropriately implemented within the existing framework of the ACCC, although this Committee is not opposed to a board structure, if thought desirable as a matter of general policy in lieu of a commission.
- Accountability of the ACCC should be increased by the appointment of a properly constituted consultative committee to provide effective feedback to the ACCC on its administration of the Act. The effectiveness of the consultative committee will depend on the willingness of business groups to contribute to the consultative process.
- The handling of individual complaints is an important aspect of accountability. Complaint handling would be improved if an associate commissioner were appointed to the ACCC to perform this function.
- It is desirable that the ACCC be able to attract commissioners with recent business and legal experience. The ability of the Government to do so is significantly dependent on the availability of adequate remuneration.
- Exchanges of ACCC personnel with key groups that the ACCC interacts with may help to develop staff resources.

Recommendations

- 11.1 Consideration should be given to the establishment of a single Joint Parliamentary Committee to oversee the ACCC's administration of the Act.**
- 11.2 The Act should be amended to establish a consultative committee to advise the ACCC on the administration of the Act. The consultative committee should be constituted so that it is convened by an independent chairperson appointed by the Treasurer. The chairperson should appoint the members of the committee in consultation with the ACCC. The committee should report to Parliament by way of a dedicated section of the ACCC's annual report.**
- 11.3 An associate commissioner should be appointed to the ACCC to receive and respond to individual complaints about the administration of the Act and to report each year in the ACCC's annual report.**
- 11.4 Consideration should be given to the manner in which the remuneration of commissioners is determined to ensure that the**

Government is able to attract as commissioners candidates of sufficient calibre.

11.5 The ACCC should consider the temporary placement of ACCC staff with other parties to develop staff resources.

11.6 The ACCC should review its service charter, in conjunction with the proposed consultative committee, in the light of the outcome of this review and the relevant recommendations of the Wilkinson Review.