
Independent policy advice and the Productivity Commission*

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Introduction

During the past decade, the number of reviews commissioned by governments on key policy issues appears to have increased exponentially. However, as the Commission has found in its current ‘review of reviews’ of regulation, some of these reviews and inquiries have done better than others in achieving improved outcomes. To borrow a catch phrase, ‘reviews ain’t reviews’. How well they have performed has depended not just on whether they have targeted the right issues, but crucially on their governance, their skill base and how they have gone about their tasks — especially their consultation processes.

In this lecture I intend to focus on one aspect of governance that has stood out as a success factor across a variety of these policy or regulatory reviews — namely ‘independence’. While many reviews have been characterised as independent, in practice this has not always been accepted by stakeholders, and that in itself has affected their influence.

I will speak about independence specifically in relation to the Productivity Commission. This is because independence is integral to the Commission’s role in advising governments and informing public opinion. It is also something that, as Chairman of the Commission, I have frequent cause to reflect on — as no doubt did my predecessor, Bill Scales, Chancellor of Swinburne University, which has sponsored this lecture.

There are two threshold questions. First, why is independence of value in a public policy sense? And, second, what does it require?

* Swinburne University, Chancellor’s Lecture, 22 September 2011. An earlier version was delivered at the 2011 National Administrative Law Conference, Canberra.

Why independent policy advice?

The simplest answer to the first question is that governments need advice that is based on a broad understanding of the public interest. Otherwise the policy-making arena could become dominated by self-interested or ideologically based claims, and end up generating exclusively bad outcomes. Claims of that kind are of course pervasive in any democracy — that's what democracy is all about. If all goes well, they should be sorted out by the political decision-making process, with advice from different parts of the bureaucracy and vigorous parliamentary debate ultimately securing courses of action in the national interest; and with the ballot box providing ultimate adjudication.

While the system works tolerably well overall — not perfectly, but as they say better than any alternative we can think of — it's an empirical fact that much bad policy does nevertheless get through.

The reality is that, particularly in complex policy areas or where good evidence is not readily available, self-interested arguments can escape the scrutiny and checks they deserve. Parliamentary debates are often not as well informed as they might be about the choices and trade-offs. And the structure and interests of government departments don't necessarily always facilitate an understanding of what is in the wider public interest.

Independent advice, if it's also well researched, public advice, can complement these other institutions by helping governments identify the best ways forward in complex or contentious policy areas. But it can also facilitate implementation, by building public confidence that the policy is well founded and therefore likely to be generally beneficial. In other words, it can increase the trust of the wider community in circumstances where many will not have, or be able to acquire, a detailed understanding of the particular policies under consideration.

What advice is 'independent'?

At bottom, independence essentially hinges on the incentives and constraints that can affect the advisor's ability to be objective and to exercise judgement based on facts and analysis, without being unduly influenced by special interests or 'third parties'. This suggests that independence is not an absolute concept. There are degrees of independence. In a formal sense, it depends on the governance arrangements around the advisor. But in a practical sense it also depends on the resourcing of advisory bodies and on the characteristics of the individuals concerned — their attitudes and beliefs, as well as their experiences and interests.

All these things affect not only how independent a particular source of advice is able to be, but also how independent it is *perceived* to be. The latter can be just as important if the advice is to serve the role of enhancing public understanding and trust in the policy-making process.

In terms of the governance arrangements, the minimum requirement for ‘formal’ independence is that the advisory body operates at arms length from the decision maker. The more substantive requirement is that the advisor is not able to be unduly influenced by any party, including the decision maker. This one is much harder to satisfy. It invokes more subtle considerations of the nature of the relationship between an advisory body and policy maker, and how the entity is funded and staffed.

In my view, the second requirement is rarely satisfied to a sufficient degree. And this deficiency in many cases has detracted from the contribution of the reviews concerned to achieving better policy outcomes.

I won’t surprise you if I suggest that the Productivity Commission passes both tests for independence. Further, I believe that this has been fundamental to the Commission’s ability to make a sustained contribution over the years. So tonight I’m going to briefly talk about those aspects of the Commission’s origins, design and operation that relate to its independence. I will consider how that independence, together with other features, have helped public policy and then allude to some challenges associated with this. (Even an independent life wasn’t meant to be easy!)

Origins of the Commission's independence

The Commission’s independence is formalised in its statute, the *Productivity Commission Act 1998*. But key features of this legislation have their origins in the *Tariff Board Act, 1922*. The Tariff Board had a quasi-judicial role in relation to its advice to government. Tariffs involve both winners and losers, and impartiality in making judgements based on the ‘evidence’, was rightly seen as essential.

The same rationale for independence was adopted by Sir John Crawford in his report to Gough Whitlam in 1973 on the replacement of the Tariff Board by an Industries Assistance Commission. The IAC was assigned a similar role, though with a wider remit, in the conflicted area of industry assistance. Its purpose, like the Tariff Board, was to provide evidence-based, impartial advice. But a crucial difference, introduced into its statute, was that it was required to take an ‘economy-wide perspective’; that is, that it must promote the interests of the community as a whole over that of any particular industry or group.

Over the years, the Commission has evolved considerably further and its work now covers much more extensive policy territory than tariffs and other industry assistance. However, the formal statutory independence that had its origins in the Tariff Board has held it in good stead. Indeed, I would argue that it has facilitated the extensions to its public policy role.

Having its own statute is clearly fundamental to the Commission's independence. The most basic reason is that it makes it hard to abolish the organisation! That would require legislation to terminate the Act, for which there would need to be reasons that got the support of both Houses of Parliament — and thus reasons that the public itself would broadly accept.

There are two aspects of the statute that bear on the Commission's independence. One relates to appointments, the second to the operations of the Commission — particularly its relationship with the government or Minister of the day.

Independent Commissioners

In relation to appointments, the independence of the Productivity Commission is embodied in the Commissioners. Together with the Chairman, they are responsible for its advice to government. This is accomplished with the support of some 200 permanent public servants; about 150 of whom are professional researchers.

Under the Productivity Commission Act, Commissioners can be appointed for up to five years. This period has the advantage of spanning more than one electoral cycle. Perhaps more importantly, it gives the Commissioners job security for their term of appointment. The only grounds for removal of a Commissioner are for demonstrated misbehaviour — the dimensions of which are specified — or physical or mental incapacity.

This means that Commissioners can't be sacked merely for giving unwelcome advice on public policy matters. That's quite significant, because there's little statutory limitation on the ability of the Commission to offer such advice. Indeed, in conducting an inquiry, the Commission has licence under its statute to “make recommendations in the report on any matters relevant to the matter referred”.

Placing that in perspective, however, the Commission has no executive power. It is not a decision maker. Its functions are advisory and informational. It is thus really only as influential as the quality of the advice and information it provides — which depend on the processes, the research and the analysis on which these are based.

Secondly, although the Commission can undertake research in support of its other activities, it cannot initiate its own public inquiries. And the inquiries that it is asked to undertake are framed by the government and can be bounded as it sees fit. (For example, the terms of reference for the 1997 review of private health insurance explicitly ruled out any recommendations for the wider health system. And our recent study on carbon policies around the world was restricted to a comparative assessment of measures in place, rather than proposing what Australia's policy should be.) Nevertheless this still leaves the Commission with scope through its supporting research to get public attention for policy issues it sees as important. For example, the recent inquiry into aged care was preceded by a self-initiated research study identifying deficiencies in existing arrangements.

Full time vs part time

How potential conflicts of interest are handled is obviously central to the independence of the Commissioners and their perceived credibility. Originally, in the IAC, Commissioners had to be full-time appointees. This had the same rationale as for the judiciary, that it would eliminate scope for conflicts that could come from other activities — particularly remunerated activities.

However in the Commission's case, that requirement became impractical over time. It was hard to recruit the kinds of people the organisation needed — people with a lot of experience, skills in a range of areas, often towards the end of their careers, who didn't necessarily want to work full-time. So currently, of the ten Commissioners, apart from myself and my deputy — both of those positions having to be full-time — half are part-time. (I might also note that half our Commissioners are women.)

While this has been beneficial in enabling the Commission to draw on people with diverse skills and experience, it has obviously increased the potential for individual conflicts of interest. In addition to provisions in the Act requiring part-timers to obtain approval for involvement in other activities, where there is a perceived conflict, that person is 'quarantined' from any related Commission matter.

Appointing the right people

Often the first question I'm asked when talking about the Commission to a foreign audience, is "how are appointments made"? People in other countries find that particularly intriguing. I suppose what they have in mind is what's to stop the government loading the Commission with people chosen mainly for their political affiliations or support for the government?

That has been an issue for some of the ad-hoc policy reviews, but in my experience it has not been thus far for the Commission.

Firstly, there are some formal protections within the Act. Appointment is by the Governor General. While obviously acting on the advice of the government of the day, the Governor General must accept that ‘the qualifications and experience of the Commissioner are relevant to the Commission’s functions’. Under the original IAC Act, the overriding consideration was to have Commissioners who would represent the public interest, rather than representing some section of the community. There was accordingly mention of Commissioners having general competencies rather than specific skills or fields of experience. The Productivity Commission Act, as part of the deal in getting it through the Senate, specifies that there should be at least one Commissioner with skills and experience in each of three specific areas — the environment, business and social service delivery.

This still allows for plenty of discretion and it would be fair to say that any government might naturally prefer to appoint people regarded as ‘one of ours’. Such appointments no doubt have been made over the years, but rarely has that outweighed considerations of competence and credibility.

There are a number of reasons for that. One is the public scrutiny that such appointments attract, and the potential for criticism of the government if an appointment wasn’t seen to be appropriate. Secondly, an appointee who was appointed on political grounds and lacked the necessary skills, would struggle in the job. Commissioners need to preside on inquiry topics that can be quite contentious, that demand a detailed understanding of the subject matter and that ultimately require good judgement. The Commission is quite exposed to public scrutiny and must be able to defend its reasoning, particularly where its recommendations, if adopted, would have a significant impact on the community, or involve some losers.

So we have seen governments appoint and reappoint Commissioners with no political affiliations or connections, and some who might if anything have been seen to have been on the ‘other side’. In my own case, I was originally appointed as a Commissioner with the Industry Commission by a Labor Government; I was then made Chairman of the Productivity Commission by a Liberal Government, and reappointed to this position under a Labor Government.

The integrity of appointments has been enhanced by the changes introduced in 2008 for all Commonwealth statutory appointments. These are now required to be advertised and to undergo a formal merit-based selection process, with recommendations to the Minister by a panel headed by the Portfolio Secretary. If the Minister chooses not to follow the advice of the panel, or to appoint someone

outside the merit process, this has to be noted or justified when seeking Cabinet approval. Two rounds of appointments to the Commission have been made under this system. It has proven beneficial both in identifying people (with about 100 applying in each round) and in securing the most suitable appointees.

There is also provision for ‘Associate Commissioners’ to be appointed for specific inquiries and this has often been utilised. Such appointments can add greatly to the Commission’s authority and credibility in areas where a deeper knowledge or background are seen as important. The Minister has unfettered discretion in making these appointments, apart from having to consult with the Chairman first (and of course obtaining agreement with relevant ministerial colleagues). Over the years many good appointments have been made, with only a few being problematic. The crucial requirement is that an Associate be capable of bringing knowledge and experience that is relevant to the topic, but with an open mind and willingness to follow the evidence about what is in the wider community’s interests.

Relationship with ‘the Minister’

The other element I wanted to talk about briefly is the Commission's relationship to the Executive, and to the Minister in particular. As I said, the Commission has no executive powers and its reporting relationships within government are obviously quite different to those of a department of state. These are best summarised as ‘the Minister can tell the Commission what to do, but not what to *say*’. When I stated this at a recent international conference in Seoul — held to celebrate the 40th Anniversary of the Korean Development Institute — it provoked a bit of a buzz. I took it that this distinction may be unusual internationally.

The Minister has formal responsibility for the Commission's work program and the Commission reports to and through the Minister. It is the Minister who formally commissions studies. However, proposals for Commission inquiries do not emerge only from the Minister’s portfolio (Treasury). They can originate from community groups, from State governments, from other portfolios and indeed from the Parliament or the Council of Australian Governments (COAG). The Minister is required to table the Productivity Commission's final reports in the Parliament within 25 ‘sitting days’, which reflects the organisation’s dual role of advising government and informing Parliament and the wider community.

The tasks given to the Commission are set out in Terms of Reference which are made public. While we are consulted for their workability (as to timing, staff resourcing etc.) and the scope in practice to do what is contemplated, the Terms of Reference obviously come to us from the Minister and reflect his judgement and

that of the Prime Minister and other relevant Ministers about what is appropriate. Any other instructions from the Minister are also made public.

So the intent of the Act is clear that, for public inquiries, the Commission's relationship with the Minister, or the government more broadly, needs to be arms length and transparent.

A number of protocols and practices have developed in keeping with that. Periodic briefings are given by the Chairman to Ministers and to Parliamentary Committees on the Commission's activities and progress. But the specifics of particular inquiries underway and what might be recommended are not discussed, and that is understood and respected.

By the same token, it is a reasonable expectation on the part of any government that there be 'no surprises', particularly with the Commission making recommendations in what are sometimes very sensitive policy areas. Accordingly, there is a long-standing convention that the Government receives briefings on a report in advance of its public release — but only after it has been signed and 'gone to the printer'.

Now this degree of separation can take a new government or a new Minister a little getting used to, and I would suggest that it has not been the norm for other 'independent' reviews. In many of these, it would seem that emerging findings are made known to and discussed with the Minister in advance. Indeed, desirable outcomes for the review may even be canvassed at the outset. However, the public credibility of such reviews has not always been high.

The portfolio matters

Which Minister or portfolio has responsibility for the Productivity Commission is not specified in the Act. It has little direct bearing on the Commission's formal independence, but it can make a big difference to its relationship with the Minister and the government of the day and, more importantly, the contribution of the organisation to public policy.

The Commission prospered least when it reported to a Minister with responsibility for a particular sector of the economy. The Commission's job is to assess industry or group claims for policy changes in a community-wide context, and this sometimes can be at odds with such a Minister's perceived role. Thus, when located in the Industry Portfolio in the 1980's, the IAC was 'withering on the vine' — to use the words of the departmental secretary at the time — whereas the institution

had a second lease of life when moved into the Treasury portfolio in 1987. Since then its remit has been widened and enhanced.

Funding and resourcing

The Act is silent on the manner and extent of the funding or resourcing of the Commission. In practice these can have a significant bearing on an organisation's independence, or more precisely its capacity to exercise it.

Policy advisory bodies — whether standing ones like the Productivity Commission or ad-hoc ones appointed for specific tasks — are most independent where they have control over their own staffing. Reviews headed by independent figures, but provided with secretariats from the relevant policy departments, can in practice be constrained or compromised. (As Sir Humphrey put it, ‘I don’t care who chairs the meeting, as long as we can write the minutes.’)

The Productivity Commission and its predecessors have always benefited from having their own staff and that’s enabled the organisation to build expertise in analysis and in the processes that the Commission follows. Over time it has also helped create a *culture* of independence throughout the organisation.

The Commission also has always been funded through a single annual appropriation, which has given it desirable flexibility in allocating its resources. (Although, I would hasten to add, never more funding than was *needed!*)

We managed to resist two funding innovations (or fads) over the years that arguably have undermined the independence of other research and advisory agencies in the public sector. One of these is project-based funding. Apart from uncertainty, it has the downside of potentially enabling greater leverage or capacity to provide pressure by the funders. We have also resisted proposals for external funding. Private funding for public research bodies was heralded in the 1990s as enabling such organisations to become more ‘relevant’, while boosting their resourcing. In practice it merely displaced government funding, such that the capacity of those organisations was unchanged, while their independence was compromised, at least as perceived publicly.

What difference has independence made?

So has the Commission’s strictly independent role made a difference to public policy? You’d expect me to say ‘yes’. I could end it there, but you deserve some explanation.

If anything surprises visiting foreign officials more than the Commission's independence, it's our *survival*. The Commission in its modern form has been around for nearly four decades. It has operated under three successive statutes, had two name changes and seen its remit widened under both Labor and Coalition Governments. That suggests that governments have seen the Commission as making a useful contribution to public policy, even though they have not always agreed with or been able to accept its recommendations. The generally accepted objectivity of the Commission's work and the transparency of its processes have, in my view, been central to that.

Against the background described earlier of the twin challenges in public policy — the technical challenge of what to do, and the political challenge of how to implement it — the Commission and its predecessors have been able to add value in a number of ways.

Impartial and considered advice

The most fundamental of these is that, in a world of many self-interested claimants for preferment and advocates for 'causes', governments have been able to rely on the Commission for advice which by its mandate must be motivated only by the public interest.

At the same time, governments have been able to depend on the rigour of the research and analysis contained in the Commission's reports, knowing that its findings and recommendations have been informed by extensive consultations and tested through public scrutiny.

Those two features have seen the organisation being called on by governments to assist in a wide range of quite difficult policy areas; areas that are complex and contentious, but with the prospect of a high payoff to the community from getting it right.

This is illustrated by some of the inquiries on our books this year. They include aged care, disability support, international carbon pricing policies, the education workforce, urban water policy, rural R&D support, airport regulation, planning and zoning, and the retail sector. Last year's crop included bilateral trade agreements, public vs private hospital performance, paid parental leave, gambling policy, the not-for-profit sector and executive remuneration. I think you will agree that all of these topics pass the 'complexity and contention' test, as well as being important to community living standards and wellbeing.

The Commission has also been an honest broker on policy issues with inter-jurisdictional dimensions and has become a resource for the Council of Australian Governments. The question in ‘cooperative federalism’ of which jurisdictions should regulate or fund which activities has often been at issue in Commission inquiries (disability services being perhaps the most important recent example). The Commission has also been asked by COAG to provide advice in areas that could be expected to remain a state responsibility, such as gambling, urban water, and education. And it has assisted the ‘competitive federalist’ process by conducting benchmarking of regulation and government service provision (the latter as Secretariat to a COAG senior officials group).

‘Ammunition’ and education

The third way in which the Commission has assisted is by providing ‘ammunition’ for governments (and sometimes opposition parties as well), in advocating policy initiatives to the public and Parliament and in countering policy proposals from special interests. For example, the evidence and analysis in Commission reports have been actively employed by the Australian Government recently in areas such as paid parental leave (against an alternative model strongly advocated by the Opposition during the last election), gambling (against the strident opposition of industry interests) and executive remuneration (against some vocal corporate objections). Wide-ranging reform programs such as the National Competition Policy and then the National Reform Agenda have been successfully advanced in part due to evidence produced by the Commission of substantial potential gains.

In some cases, the Commission’s work has helped build active constituents for reform, by demonstrating to certain industries or groups the costs to them of the status quo and the benefits of a change in policy direction. This is generally acknowledged, for example, in relation to the role played by the farming and mining associations in tariff reform, and business support for the reform of public utilities. But it has also been a factor in some of our more recent work in social policy areas, such as aged care and Indigenous disadvantage.

And we’ve arguably made government’s ‘selling’ job a bit easier through our own consultative processes, which on key policy issues such as those just mentioned, have assisted public understanding and helped bring the community along.

In those various ways, the Commission's inquiries and reports have helped create a more benign or receptive political environment for policy change.

Finally, our processes and, in particular, our draft reports can provide a source of political learning for governments, giving them an opportunity to observe how the

public responds to different policy proposals and thus better judge the politics of different options. In some cases this has led government to accept and implement ‘bold’ recommendations (eg. the modification of community rating in private health insurance — long regarded as untouchable); in others, it has led it to reject or defer reforms (eg. the ban on parallel book imports).

These benefits have seen the Commission being assigned an increasingly diverse range of tasks, with a large consignment at any one time. Unfortunately, resourcing hasn’t always kept pace. There is a rough justice in using a blunt rule like the annual ‘efficiency dividend’ to oblige government departments across the board to be cost-conscious and to reduce unnecessary or low payoff spending. While research agencies may also need some prompting to be cost-effective in their activities, there is a limit to which they can produce quality outputs with fewer inputs, particularly when the research agenda itself is externally imposed. The American economist Joseph Baumol’s analogy of trying to get ever higher productivity out of an orchestra is apt — ultimately you would be left with a drum and a fife to play a Beethoven symphony!

The role of Parliament

Some new demands on the Commission have arisen under the so-called ‘new paradigm’ of minority government at the Federal level. The Commission has been called on to play an informational role in the context of negotiations with minority parties and independents; negotiations which have become important to policy outcomes. Examples include our studies on gambling, private vs public hospitals, and comparative carbon policies. This is essentially an extension of the Commission’s ‘honest broker’ role and one that we are well placed to perform.

However there has been a further development in the past year, whereby the Parliament has sought to override the government, the executive, in commissioning work directly from the Productivity Commission. There have been two routes. One is by introducing legislation requiring us to undertake certain tasks. Examples are the recent Bill on a cost-benefit analysis for the NBN (defeated) and another on foreign ownership of agricultural land (passed the lower house). The second, and more problematic route, has been through Orders by the Senate for the Commission to provide it with reports on certain matters (one related to default super fund allocation mechanisms, another to the introduction of a sovereign wealth fund.)

These initiatives are unprecedented in the nearly four decades of the institution’s existence. If successful, the latter route in particular would pose obvious problems for the effective operations of the Commission, in terms of logistics and the disruption of existing inquiries. But, more importantly, it would also become a

threat to its continued existence. It would be likely to tip the balance, from any government's point of view, from the Commission being seen as an asset to it being seen as a liability.

So it was with some relief that I read recent advice from the Australian Government Solicitor that such orders — going beyond requiring us to furnish documents based on information in our possession, to undertaking new work — would exceed the Senate's powers. The AGS advice is a particularly erudite piece of work and deserves to be widely read in the current political environment. It states in conclusion:

... the power of the House of Parliament to require production of documents is not a power to require original work to be undertaken and it cannot be exercised to usurp the power of the Executive.

And it cites an earlier authority, Hearn's *Government of England* (1886), in more colourful terms:

It is the duty of Parliament to advise, but not to command, the Crown ... It cannot of itself issue orders even to the doorkeepers of any public departments.

Whether this will be accepted as the last word remains to be seen, however — so watch that space!

Summing up

In conclusion, policy making occurs in a complex and conflicted arena, one that in many cases is hindered by lack of evidence and biased in ways that can favour special interests over the public interest. Independent policy advice can play an important role not only by helping governments determine what to do amidst such competing or conflicting claims, but also by helping them achieve it through greater public understanding and a more benign political environment.

There are degrees of independence. The Commission and its forebears were created and expressly designed to achieve it to a high degree. This has enabled the organisation to contribute to better policy development in an increasingly wide range of areas. Those qualities may be at a premium right now under the 'new paradigm' federally, and this is also raising some interesting new challenges for the organisation.