

## INDEPENDENT POLICY ADVICE AND THE PRODUCTIVITY COMMISSION

*Gary Banks\**

During the past decade, the number of reviews commissioned by governments on key policy issues appears to have increased exponentially. However, 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.

One aspect of governance that has stood out as a success factor across a variety of policy reviews is 'independence'. While many reviews have been characterised as independent, in practice their independence has not always been accepted by stakeholders, which in itself has affected their influence.

I will consider the question of independence specifically in relation to the Productivity Commission. The Commission's independence is integral to its role in advising governments and informing public opinion; I have thus had frequent cause to reflect on its implications.

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

### **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. Without this 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 is 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—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 is an empirical fact that much bad policy does nevertheless get through.

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 can militate against an understanding of the wider impacts on the economy and community.

---

\* *Gary Banks AO is Chairman, Productivity Commission. This article is based on a paper presented at the AIAL 2011 National Administrative Law Conference in Canberra.*

Independent advice, if it is also well researched public advice, can complement departmental sources by helping governments identify the best way forward in complex or contentious policy areas. It can also facilitate implementation, by building public confidence that the policy is well founded and therefore likely to be generally beneficial. 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’?**

Independence essentially hinges on the incentives and constraints that can affect the advisor’s ability to be objective and to exercise judgment 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. However, 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 experience 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 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 cannot be unduly influenced by any party, including the decision maker. This 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. This deficiency in many cases has detracted from the contribution of the reviews concerned to achieving better policy outcomes. In contrast, the Productivity Commission passes both tests for independence; this has been fundamental to its ability to make a sustained contribution over the years.

### **Origins of the Commission's independence**

The Commission’s independence is formalised in its statute, the *Productivity Commission Act 1998* (Cth), but key features of this legislation have their origin in the *Tariff Board Act 1922* (Cth). 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 judgments based on transparent ‘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 (IAC) (Crawford, 1973). The IAC was assigned a similar role, though with a wider responsibility, in the conflicted area of industry assistance. Its purpose, like that of the Tariff Board, was to provide evidence-based impartial advice. However, a crucial difference, introduced in its statute, was that it was required to take an ‘economy-wide perspective’, ie it must promote the interests of the community as a whole over those of any particular industry or group.

Over the years, the Commission has evolved considerably 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 it has facilitated the extensions of 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! Legislation would be required to repeal the Act, for which there would have to be reasons that gained the support of both Houses of Parliament—reasons that the public would broadly accept.

Two aspects of the statute are relevant to the Commission's independence. One relates to appointments, the second to the operations of the Commission—particularly its relationship with the Government and Minister.

### ***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 advice 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. The only grounds for removal of a Commissioner are demonstrated misbehaviour—the dimensions of which are specified—and physical or mental incapacity. This means that Commissioners cannot be sacked merely for giving unwelcome advice on public policy matters. This is significant, because there is little statutory limitation on the ability of the Commission to offer advice. Indeed, in conducting an inquiry, the Commission has a 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 judgments on which these are based.

Although the Commission can undertake research in support of its other activities, it cannot initiate its own public inquiries. The inquiries that it is asked to undertake are framed by the government and can be bounded as the government 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. 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, the Commission has scope, through its supporting research, to attract public attention to 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 v 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 rationale was the same as for the judiciary, that it would eliminate scope for conflict that could come from other activities—particularly remunerated activities.

However, in the Commission's case, over time that requirement became impractical. It was hard to recruit the people the organisation needed—people with a lot of experience, skills in a range of areas, often towards the end of their careers, who did not necessarily want to work full time. Currently, of the ten Commissioners, apart from the Chairman and Deputy Chairman—both of which are full time positions, half are part time.

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 time Commissioners 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 am asked when talking about the Commission to a foreign audience is 'how are appointments made'? I suppose what they have in mind is: what is to stop the government loading the Commission with people chosen mainly for their political affiliation or support?

This has been an issue for ad hoc policy reviews but, in my experience, it has thus far not been an issue 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 *Industries Assistance Act 1973* (Cth), 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* specifies that there should be at least one Commissioner with skills and experience in 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 a person regarded as 'one of ours'. Such appointments no doubt have been made over the years but these have rarely outweighed considerations of competence and credibility.

One reason for this is the public scrutiny that such appointments attract and the potential for criticism of the government if an appointment was seen to be inappropriate. Secondly, an appointee who was appointed mainly 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 complex subject matter and that, ultimately, require good judgment. 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.

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 justified when seeking Cabinet approval. Two rounds of appointments to the Commission have been made

under this system. The new system has proven beneficial both in identifying people (with about 100 applying in each round) and in securing the most suitable appointees.

There is also legislative provision for 'Associate Commissioners' to be appointed for specific inquiries; 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 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). The crucial requirement is that an Associate be capable of bringing not only knowledge and experience that is relevant to the topic, but also an open mind and willingness to follow the evidence to what is in the wider community's interests.

### **Relationship with 'the Minister'**

As noted, the Commission has no executive powers and its reporting relationships within government are quite different to those of a department of state. These might be best summarised as 'the Minister can tell the Commission what to do, but not what to say'.

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 (Treasury) portfolio. They can originate from other portfolios, community groups, from State governments, and indeed from the Parliament or from 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 formally in Terms of Reference which are made public. While the Commission is consulted as to their feasibility and workability (eg timing, staff resources etc), the Terms of Reference come from the Minister and ultimately reflect his or her judgment and that of the Prime Minister about what is appropriate. Any other instructions from the Minister are also made public.

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

A number of protocols and practices have been developed over time. Periodic briefings are given by the Chairman to Ministers and to Parliamentary Committees on the Commission's activities and progress. The specifics of particular inquiries underway and what might be recommended in these are not discussed at these briefings.

However, 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 of the day receive briefings on a report in advance of its public release—but only after it has been signed and 'gone to the printer'.

This degree of separation has not been the norm for 'independent' reviews. In many of these it seems that emerging findings have been raised with the Minister in advance. Indeed desirable outcomes for a review may have been canvassed at the outset. However the public credibility of such reviews has not always been high.

### ***The portfolio matters***

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

The Commission's predecessors arguably prospered least when they reported to Ministers with responsibility for particular sectors of the economy (Rattigan, 1986; Banks and Carmichael, 2007). The Commission's job is to assess industry or group claims for policy changes in a community wide context, which can sometimes be at odds with such a Minister's perceived role. When located in the Industry Portfolio in the 1980s, 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 it was moved into the Treasury portfolio in 1987. Since then its responsibility has been widened and its role enhanced.

### **Funding and resourcing**

The Act is also silent on the manner and extent of the funding or resourcing of the Commission. In practice these factors can have a significant bearing on an organisation's independence or, more precisely, on 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 has enabled the organisation to build expertise in analysis and in operational processes. Over time it has also helped create a culture of independence throughout the organisation. The Commission 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!*)

Over the years, the organisation has managed to resist two funding innovations that arguably 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 funder. The Commission also resisted proposals for external funding. Private funding requirements for public research bodies was heralded in the 1990s as enabling those organisations to become more 'relevant', while boosting their resourcing. In practice it merely displaced government funding, with the result that the capacity of those organisations was little changed, while their independence was compromised, at least as perceived publicly.

### **What difference has independence made?**

If anything surprises visiting foreign officials more than the Commission's independence, it is the organisation's *survival*. The Commission in its modern form has been in operation for nearly four decades. It has operated under three successive statutes, had two name changes and has seen its responsibilities widen 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 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 evidence and analysis contained in the Commission's reports and know that its findings and recommendations have been informed by extensive consultations and subject to public scrutiny.

Those two features have seen the organisation being called on by governments to assist in a wide range of policy areas; areas that are both 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 conducted in 2011. These include aged care, disability support, international carbon pricing policies, the education workforce, urban water policy, rural R&D support, airport regulation, urban planning and zoning, and the retail sector (Productivity Commission, 2011). The previous year's inquiries included bilateral trade agreements, public v private hospital performance, paid parental leave, gambling policy, the not for profit sector, and executive remuneration.

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 an issue in Commission inquiries (disability services being an important recent example). The Commission has also been asked by COAG to provide advice in policy areas that could be expected to remain a state responsibility, such as gambling, urban water, and the education workforce. The Commission 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 certain policies to the public and Parliament and in countering policy proposals from special interest groups. 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 the National Reform Agenda have been successfully advanced, in part due to evidence produced by the Commission of substantial potential gains (Productivity Commission, 2005).

In some cases, the Commission's work has helped build active constituencies 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. Examples of this include the role played by the

farming and mining associations in tariff reform, and business support for the reform of public utilities. It has also been a factor in some of our more recent work in social policy areas, such as aged care and indigenous disadvantage.

The Commission has arguably made government's 'selling' job a bit easier through its own consultative processes, which on key policy issues, such as those mentioned above, have assisted public understanding and approval.

Finally, the Commission's processes and, in particular, its 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 importation of books).

These benefits have seen the Commission being assigned an increasingly diverse range of tasks, with a large number underway at any one time. Unfortunately, resourcing has not always kept pace. There is 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 prompting to be cost effective in their activities, there is a limit to the production of quality outputs with fewer inputs, particularly when the research agenda itself is externally imposed. The American economist William Baumol's analogy of the futility of trying to get ever higher productivity out of an orchestra is apt (Baumol and Bowen, 1966)—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 the studies on gambling, private v public hospitals, and comparative carbon policies. This is essentially an extension of the Commission's 'honest broker' role and one that it is well placed to perform.

However, there has been a further development in the past year, whereby the Parliament has sought to override executive government by commissioning work directly from the Productivity Commission. This has taken two forms. One has been by introducing legislation requiring the Commission to undertake certain tasks. Examples of this are the recent Bill on a cost benefit analysis for the NBN (defeated) and another on foreign ownership of agricultural land (which 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 superannuation fund allocation mechanisms in industrial awards and 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 operation of the Commission, in terms of logistics and the disruption of existing inquiries. More importantly, it would undoubtedly also become a threat to its continued existence. Losing control over what policy issues the Commission examines would be likely to tip the balance, from a government's point of view, from the organisation being seen as an asset to it being seen as a liability.



In the event, advice was received from the Australian Government Solicitor that such orders—going beyond requiring the Commission to furnish documents based on information in its possession, ie to undertake new work—would exceed the Senate’s powers (PM&C 2011). The AGS advice 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.

It also cites an earlier authority, Hearn’s *Government of England* (1886):

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.

## 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 advisory processes and institutions can play an important role not only by helping governments determine what to do amid such competing or conflicting claims but also by helping them achieve it through fostering greater public understanding and a more benign political environment.

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

## References

G Banks and W B Carmichael, ‘Domestic Transparency in Australia’s Economic and Trade Reforms’, in G Banks, *An Economy-wide View: Speeches on Structural Reform* (Productivity Commission, 2010).

W Baumol and W Bowen, *Performing Arts: the Economic Dilemma* (The MIT Press, Massachusetts, 1966).

J G Crawford, *A Commission to Advise on Assistance to Industries* (Government Printer, Canberra, 1973).

Prime Minister and Cabinet, ‘Power of the Senate to order the Information Commissioner or the Productivity Commission to report to the Senate’, Submission to *Senate Committee of Privileges Inquiry: Guidance for Officers Giving Evidence and Providing Information*, 2011.

Productivity Commission, *Review of National Competition Policy Reforms* Report No. 33 (Canberra, 2005).

Productivity Commission, *Annual Report 2010-11* (AGPS, Canberra, 2011).

G A Rattigan, *Industry Protection: The Inside Story* (Melbourne University Press, 1986).