The ACCC: Guardian of Viable Markets and Consumer Rights

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INTRODUCTION

In 2016, following a successful investigation by the Australian Competition and Consumer Commission (ACCC), Nippon Yusen Kabushiki Kaisha pled guilty to operating a criminal cartel fixing the freight price of vehicles imported to Australia. In 2017, the Federal Court of Australia imposed a penalty of AUD25 million (the second highest penalty ever imposed since the inception of the ACCC). This prosecution followed earlier litigation successes against Reckitt Benckiser Australia Pty Ltd. for misleading or deceptive conduct.

These and other recent successes have generated domestic and international acclaim for the ACCC. Australia's Royal Commission into Banking

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in 2018 criticized most regulatory agencies in the sector but lauded the ACCC. Indeed, the ACCC's mandate was subsequently expanded to take over responsibilities for supervising financial services from the Securities and Investments Commission. The ACCC received international praise for its vanguard inquiry into market dominance of social media giants Google and Facebook. In 2019, the ACCC was named Global Competition Agency of the Year (Danckert 2019; Mason 2019). In short, the ACCC has rapidly established a formidable reputation with firm institutional embedding in its environment.

The ACCC's founding legislation tasks the agency to enforce both competition and consumer law for the 'public interest'. The protection of competition and consumers is integral to the cohesive functioning of the economic and social system. While competition can be a good thing, it should not push companies to cut corners on the safety of their services and products. The ACCC thus has a dual, seemingly contradictory, mission: to ensure that markets function in ways that both encourage competition and protect consumer welfare (Beaton-Wells and Haines 2010; Parker and Scrinis 2014).

Standing up for the interests of consumers and the optimal functioning of markets may be a lofty mission, but in and of itself it does not ensure stakeholder support. Quite the opposite: some of the ACCC's interventions have met with considerable opposition and garnered political controversy, inviting critical scrutiny from all sides. Moreover, the ACCC must contend with powerful corporations and vested interests. Its mandate inevitably embroils the ACCC in conflicts over the power of big (international) corporations and (global) economic structures in Australian public life (Edwards 2020).

Australia was relatively late to introduce (in 1974) 'enforceable' competition and consumer law (in comparison with other OECD countries). Today, the ACCC's functions, regulatory instruments and legal sway are as, if not more, extensive than those of its international counterparts. Its steadily expanding remit and powers have come to include education of both consumers and businesses, investigation, authorization of certain (otherwise) anti-competitive conduct that is in the public interest, price regulation of monopolies and regulation and enforcement of competition and consumer law across multiple sectors of the Australian economy.

The ACCC also performs a wide array of expert advisory functions. Examples include its convening of the government's inquiry into the dairy

sector and the role of supermarkets' purchasing powers (2016–2018), membership of a Treasury-led working group overseeing the residential mortgage market (2019), and of a wide-ranging inquiry into the gas market (2017). Simultaneously, the ACCC maintains a firm footing in the domestic lives of Australian consumers, for example by providing widely accessed 'Scamwatch' updates, publishing local petrol pricing comparators, and making itself accessible through Commissioner appearances on prime-time lifestyle programs advising consumers on issues as varied as how to survive the Christmas sales and how to navigate electricity markets.

This chapter interrogates the institutional history, formation, and ongoing institutionalization of the ACCC. Drawing on Philip Selznick's classic studies of institutions and processes of institutionalization (outlined in the introduction to this volume), this chapter analyzes how the ACCC has become a taken for granted and publicly valued part of the economic governance landscape in Australia in the face of both corporate and, at times, political resistance.

While a relatively 'young' agency (created in 1995) compared to other examples in this book, the ACCC has its roots in a much longer historical process to establish a robust national legal and administrative framework for promoting competition, fair trading and efficiency. ACCC formed from a merger of pre-existing organizations: the former Trade Practices Commission (TPC 1977–1995) and the Prices Surveillance Authority (PSA 1983–1994). Our contention is that this lineage presented significant endogenous institutional resources. The ACCC was bequeathed routine patterns of action, including models of ethical leadership, which later leadership could recombine, amplify and adapt; a process which has thus far secured institutional embedding of the agency (cf. Berk 2009; Farjoun et al. 2015). We argue that the ACCC built upon the internal and external routines of its predecessors to create a virtuous cycle of institutionalization (explained in the introduction to this volume).

We first describe the collision of legal, organizational and political trajectories that preceded and informed ACCC's creation and formal design. We then characterize its process of institutionalization by using Selznick's (1957) criteria of (1) a distinct identity and unique competence; (2) strong reputation and public legitimacy; and (3) enduring viability through adaptation. Finally, we consider the forces of erosion that challenge the ACCC but, to date, have not disrupted its professional

commitment to substantive enforcement nor public reputation as a highly regarded national institution.

ROOTED IN HISTORY: THE ACCC'S PRECURSORS

The ACCC began operations on 6 November 1995. Formally, the agency's birth occurred through parliamentary amendments to the then *Trade Practices Act 1974* (Clth) (TPA 1974), later to be replaced by the *Competition and Consumer Act 2010* (Clth) (CCA). The creation of the ACCC was a significant juncture in Australia's competition policy. For the first time, a national agency would become responsible for regulating and enforcing competition law across Australia's federation. Also, for the first time, the legislative 'authorization' functions of the competition regulator (alongside prosecution and education functions) expanded to include overseeing price regulation and access to essential utilities such as electricity and telecommunication networks. Internationally, ACCC's design was unique for its focus upon both competition and consumer law in just one agency and its multi-sector (from electricity to telecommunications public utility) focus (Ottow 2014; Jenny 2016). For the agency, it was just the beginning of an expanding mandate, broadening enforcement instruments and increasing administrative size.

The creation and subsequent institutionalization of the ACCC occurred in the context of various legal, organizational and political developments (Bannerman 1985) that furnished the raw materials for forming a distinctive institution. We focus here upon the legal, organizational and political paths that collided with ACCC's formation. An important development was the privatization of public services and their exposure to competition and price regulation. In Australia, most significant privatization reforms began in the early 1990s with sales of public assets, such as public companies/enterprises and statutory authorities at both state and national levels. They included the sale of banks, state insurance offices, airports and railway corporations, electricity generators and electricity and gas distributors (Walker and Con Walker 2000).

By far the largest privatization (in sale value) was Telstra. Australia's telecommunications provider (initially a monopoly) was first opened up to competition and then sold in two tranches. Informed by then prevailing neoliberal orthodoxy as to the advantages of market competition, privatization both drew from, and gave momentum to existing competition law and the rise of regulation (and public regulators) across western

economies (Moran 2002). Australia was no ‘bit player’, being only second to the United Kingdom in dollar terms of its privatization programs (Walker and Con Walker 2000: 17).

Australian efforts to provide legal foundations for federal competition policy began much earlier, prior to neoliberal orthodoxy, and followed an ‘Austerican’ course. That is, a coevolution between British and American anti-trust laws to fit changing Australian social, political and economic structures and perceptions (Brenchley 2003: 30–32). Hardly an unusual pattern in Australian political/policy institutions (Patapan 1997) the legal origins for this Austerican competition law date back to 1906 with the passing of the Australian Industries Preservation Act (AIP). The AIP followed a solid anti-trust pedigree from the US Sherman Act at a relatively early stage in Australia’s fledgling federation but foundered on constitutional limits to the federal government’s jurisdiction.

Australia’s path to entrenching ‘enforceable’ federal competition legislation would take almost another 70 years through the passing of the TPA (1974). As Bannerman (1985), a former Trade Practices Commission Chairman, later commented business at this time was something of an exclusive club and only insiders knew what the rules were. Those rules included price fixing and control of delivery mechanisms, all of which went largely unremarked. One example directly relevant to consumers of the day was the practice of petrol price fixing. Petrol stations were tied to specific suppliers and owners were obliged to charge the prices set by those suppliers.

The TPA brought distinctively Australian (and New Zealand) features to its competition approach, such as the groundwork for inclusion of consumer law within competition legislation. As consumer law was initially solely a state responsibility, this also paved the way for experience of cross-jurisdictional collaboration for Australia’s first competition regulator—the Trade Practices Commission (TPC 1977–1994). Later amendments to the Act, particularly in 1995 and 2010, would extend the legislative mandate to all business activity (including state public utilities or enterprises) across the nation and enable a national Australian consumer law with the renaming of the TPA as the *Competition and Consumer Act 2010* (Emerson 2010: 2718).

At the time of the TPA’s inception, competition law was unprecedented and untested in Australia. There were not yet any clear precedents for pursuing legal action. The then Commissioner, Ron Bannerman (1965–1974), took careful carriage of slow *case by case* challenges to the

legality of companies' registered agreements, thus testing argument for the contestation (or authorization) of their breach of the 'public interest'. Authorities needed to discover what it would enable them to do in terms of breaking up concentrations of corporate power, all too clubby and comfortable business networks, the misleading and manipulation of consumers, and other abuses of the public's trust. Through using the powers of the law, authorities had to test the waters to find out where its boundaries lay, and what norms and practices would sustain its effective application (Bannerman 1985; Grabosky and Braithwaite 1986).

The legal framework and parentage of the Trade Practices Commissioner within the Attorney-General's Department lent a premium to legal 'evidence, logic and argument' (Bannerman 1985: 88). Organizationally, the Commissioner had to develop capabilities and routines that would support this orientation in the emerging application of the TPA. For example, in collecting and preparing case hearings at the Tribunal, the Commissioner needed to demonstrate that processes were fair and that by pursuing legal actions the Commissioner was educating businesses and the community at large about the meaning of the law. These emerging practices set a precedent of independent, evidence-based administrative and legal decision-making, purposefully removed from party politics. They created organizational capacity and examples of how to operate effectively and with integrity. Furthermore, the consultative work of the Commissioner contributed to changing perceptions among businesses, unions and the public of the desirability of competition law (Merrett et al. 2007) which, in turn, led to increased support from these groups.

The TPA (1974) brought considerable expansion of legal and administrative capacity. Bannerman became the Chair (1974–1984) of a new agency devoted to administering and enforcing competition law: the Trade Practices Commission (TPC). This required extending existing routines of investigation, legal testing and developing expertise to the whole spectrum of competition law—from the initial focus on price agreements and deceptive conduct towards the more challenging terrain of assessing mergers and acquisitions.

The fledgling TPC was not helped by the return to power of a more pro-business Liberal/Country Party government (1975–1983), which at times tried to curb its mandate and tweak its capabilities (see Venturini 1980 for colorful accounts). The subsequent Labour government's success in beating economic stagnation and inflation created a

buoyant, anything-goes economic climate in which regulatory ‘nitpicking’ was not always welcomed either. And irrespective of which party controlled government, a small and new agency-like TPC had to fight constant funding battles just to survive (Venturini 1980; Bannerman 1985; Brenchley 2003). Over time, however, it benefitted from increasing legal, economic and regulatory scholarly interest in its work, which laid the foundation for its further professionalization (Corones et al. 2009).

Specifically, TPC’s third Chairman Professor Bob Baxt (1988–1991), a trade practice academic and legal practitioner, worked hard to grow the agency’s capacity for undertaking litigious action and more sophisticated enforcement strategies. During his time as Chairman, key commissioners including ANU scholar John Braithwaite and consumer law advocate Allan Asher developed an ‘enforcement pyramid’. This innovative approach to regulatory supervision meant that the ACCC initially responded to illegal behaviour through educating and informing businesses about the law at the ‘base’, only to move up the ‘pyramid’ of more serious sanctions ending with court action at the point (Corones et al. 2009). Use of education and public information, including publicizing corporate misdemeanours, was intended to influence corporate behaviour in more comprehensive and intrinsic ways, rather than simply relying only on legislative prosecution. By issuing ‘first priorities and directions statements,’ Baxt also ensured that the TPC was transparent about its policies and intentions. Finally, he set out to persuade corporations and business sectors to develop productive competition law compliance cultures, for instance, by investing in consultative processes with business and consumers.

In 1983, the Prices Surveillance Authority (PSA)—the ACCC’s other ‘parent organization’—was established. PSA was created within the Department of Treasury in 1983 (Head 1986; Brenchley 2003). PSA’s location in Treasury brought organizational experience of working close to political power, as opposed to the purposeful aloofness of the TPC in the Attorney-General’s Department. Set up to assist in curbing inflationary pressures in an economy quickly coming out of a deep recession, the PSA was not given powers to adjudicate or prosecute, only to investigate and publicize.

In marked contrast with the legal orientation that prevailed within the TPC, Professor Allan Fels, the inaugural Chairman of PSA in 1989 and eventual founding Chairman of the ACCC (1995–2003) made do with what he got and set the new agency on a course of relentless high-profile,

media-sustained public shaming of business pricing malpractices. Lacking legislative or constitutional powers, Fels opted to investigate and then to publicize issues of commonplace consumer spending notably petrol pricing and the cost of books, CDs and even funerals. Time and again, he sought to demonstrate how Australian consumers were being forced to pay more than was reasonable, or were excluded by business cartels and monopolies from products available elsewhere (Brenchley 2003).

By the early 1990s, there was broad political support for restructuring the Australian economy and extending the TPA to industries still under state/territory jurisdiction.

This period saw a suite of measures designed to boost productivity, including removal of trade barriers, labour market deregulation and collision of existing competition law and institutional achievements with new competition policy (including programs to privatize public monopolies). In October 1992, the Australian Labour Government established an independent investigation of national competition policy: the Hilmer Inquiry. It reported in August 1993, recognizing that—although Australia is a federation of states and territories—it could benefit strongly from creating a single market. The inquiry recommended adoption of a national competition policy. This was to be supported by the establishment of a National Competition Council to arrive at integrated policies and draft specific federal-state competition agreements. The Council was intended to be complemented by the establishment of an Australian Competition Commission responsible for administering and enforcing the new national competition policy.

In February 1994, the Council of Australian Governments (the platform where all Australian states and territories negotiate and coordinate policies with the federal government) accepted the thrust of the Hilmer recommendations. It agreed to the establishment of an Australian Competition Commission (Council of Australian Governments 1994) which was ultimately enacted as the ACCC. The ACCC was recognized in amendments to the TPC (1974) and took effect through a merger of the TPC and PSA.

BUILDING THE ACCC

After its establishment, the ACCC's role became to enforce the successor to the Trade Practices Act, the *Competition and Consumer Act 2010*. It was set up in 1995 with bipartisan support in the Australian parliament.

Its mission to ‘make markets work for consumers, now and in the future’ (Australian Competition and Consumer Commission, n.d.).

Our argument is that the TPC and PSA experience (discussed above) informed internal and external patterns of action (‘routines’) that ACCC leadership used to institutionalize the agency. The TPC and PSA bequeathed potent models of organizational leaders with integrity and fight to the new agency (Merrett et al. 2007; Corones et al. 2009). From the TPC, ACCC inherited established capacity for legal evidence and expert independence, precedents for experimenting and pushing the boundaries of the law in the context of social change, a wide repertoire of regulatory instruments, initial principles for transparency and longevity of tenure among expert staff. From the PSA, ACCC inherited routines for engaging media publicity and grabbing the interests of consumers and politicians.

ACCC’s founding legislation set out provisions for the appointment of a Chairperson and Commissioners. Australia’s Governor-General appoints the Chair and Commissioners on recommendation from the responsible national government Minister. Appointees must have demonstrated expertise in industry, small business, commerce, economics, law, public administration or consumer protection. All state and territory governments are consulted before appointments are finalized, and a majority must support those appointments. These requirements provide a check on purely political appointments by the national government. Commissioners can be reappointed, and many have been several times. Once appointed, Commissioners have statutory office status, which gives them a legal mandate to make rulings within their sphere of competence and enshrines their independence from the government of the day.

The first Chairperson of the ACCC, serving from 1995–2003, was Professor Allan Fels; an academic and economist who had chaired both the TPC and the PSA (the predecessor regulatory agencies that merged to form the ‘new’ ACCC). Along with the inaugural group of Commissioners, Fels brought broad experience, far-reaching ambition, and a fighting spirit to the ACCC. He did not shy from opportunities presented by the momentum of the national competition policy and ACCC’s enhanced formal mandate compared to predecessor agencies.

Crafting a Combative Regulatory Machine

Fels ratcheted up the pursuit of enforcement through litigation, which directed staff attention and legal expertise towards identifying appropriate cases. Fels and his Deputy Chairman Allan Asher had already begun an ardent litigation strategy while they were at the helm of the TPC (1991–1995). This resulted in successful prosecutions that occurred just as the ACCC began its operations. Oft-cited cases include the TNT/Mayne Nickless freight express cartel, which saw the ACCC garner the court's imposition of penalties and costs totaling AUD14 million in 1995, and the Aboriginal insurance case (more below). The Aboriginal insurance case opened the way for the ACCC to use 'enforceable undertakings' as a regulatory instrument. Enforceable undertakings are the capacity to negotiate an informal settlement which is court enforceable should offenders default (Australian Competition and Consumer Commission 2004, 2014). The TPC/ACCC also pursued moral retribution in informal settlements and by holding as many parties—individual or corporate—legally liable for contributing to the conduct.

With TNT/Mayne Nickless, the ACCC used its investigative work to reveal in court how executives of three different freight companies reached agreements to allocate customers and market share. This case made ordinary Australians conscious of corporate misconduct. It was also significant for subjecting executives to personal fines, sending shockwaves through the business world. Similarly, the Aboriginal insurance case involved a series of cases revealing various well-known insurance companies (from Colonial Mutual to AMP) engaging in predatory selling practices through misrepresentation and unconscionable conduct in remote Aboriginal communities. ACCC special investigators from Queensland and the Northern Territory Regional Offices cooperated closely with local community members to put the case together.

The agency continued to develop its approach in pursuit of best practice, although some scholars queried whether its litigation strategy did much to ensure business compliance (Parker 2006; Parker and Lehman Nielsen 2011). Coined the 'engine room' of the ACCC, the Enforcement Committee was initially chaired by Deputy Chairman Asher; a former consumer law advocate (Brenchley 2003). While at the TPC, Asher had internalized academic insights into how to create an effective agency and regulatory compliance strategy. Braithwaite, an internationally renowned regulatory scholar from the Australian National University, had worked

with Asher as part-time Commissioner in the TPC to develop and apply an enforcement framework for effective compliance on ‘a limited budget’ (Corones et al. 2009: 150). This inspired the development of a proactive enforcement culture through strategically selecting targeted cases, relentlessly appealing failed cases (when financially viable), and soft-power repertoires (such as naming and shaming in the media, among others) to secure corporate compliance.

The agency invested in the professionalization, technical expertise and value alignment of its staff. Supply of talented and committed employees was boosted by the broad momentum that competition policy continued to enjoy within Australian society. This created opportunities for trade lawyers, professionals in merchant banking, share analysts, criminal investigators and economists to pursue careers in regulation and enforcement. Also, the ACCC had inherited from the TPC a cadre of dedicated professionals with a deep appreciation for the organization’s public value proposition.

Insiders attest to a culture of frank internal discussion in the ACCC, with Commissioners deliberating vigorously in a Cabinet-style process (Schaper 2019). Annual, externally focused Chairman statements of priorities listing the issues, topics or industries that would be the focus for the next year (instigated as an internal routine by Baxt in the TPC), and Statements of Intent responding to the Minister’s Statement of Expectations became transparency routines. Strategies regarding selection of legal cases or tackling requests for government inquiries, though, are carefully guarded and prepared internally. Unlike its regulatory peers, for example in Australia’s financial sector, ACCC remains untouched by accusations of collusion.

The ACCC is a self-consciously proud agency. It celebrates its past and organizes reflection upon its experiences. TPA jubilees are celebrated, and the organization hosts various annual lectures named after competition administrators or consumer law heroes, such as the Bannerman Competition Lecture and the Ruby Hutchinson Memorial Lecture.

Securing Public Legitimacy

In ACCC’s formative years, under Chairman Fels, media profiling was a part of a strategic effort to bolster agency reputation and secure support from (or at least disarm) the authorizing environment, notably government and business. Biographical studies refer to Fels’ PSA days and how it

taught, and brought, experience of using the media to obtain widespread social support for organizational mission (Brenchley 2003; Fels 2010). For example, highlighting actions, that garnered popular support, or explaining the benefits to the consumer of technical legal issues, such as what constitutes ‘misuse of market power’. A self-confessed ‘media tart’, Fels courted publicity and had a knack for picking fights with ‘big end of town’ corporations that exposed less salutary aspects of their operations. ACCC also used other strategies for securing wide legitimacy for the operations and mission, for example, incorporating affected consumers in investigating and developing legal prosecution, and, through drawing from knowledge accrued by state offices.

Fels used the media in ACCC’s early years to trumpet the enforcement successes and consumer protection mission of the organization. Besides building a broad constituency and familiarity for ACCC’s work, this reverberated internally as staff saw that their daily work, mission, and ultimately intrinsic motivation were publicly celebrated. Moreover, using the media to secure moral deterrence of corporate misdemeanours was consistent with the pyramid of enforcement noted earlier (Parker 2006). ACCC developed internal routines for identifying and responding to the conduct they wished to affect through less to more intrusive enforcement, e.g. from education about internal compliance systems for specific sectors or persuasion on moral standards, to sanctions, obtaining reparation and legal action (J. Braithwaite 2002; V. Braithwaite 2007).

Fels’ media presence also put government and (big) business on notice about the support ACCC was gathering from consumers, small business and farmers. Ultimately, this did not preclude big business from lobbying publicly against the hard enforcement line of the ACCC (and its celebrity Chairman in particular). The public shaming of corporate misdemeanours brought ferocious counteraction from business precisely because such public moral disrepute was far more damaging to them than financial penalties (Parker 2006). Settlements often followed when businesses considered their position in this light.

Notwithstanding the tough and very public battles ACCC action prompted, the ACCC’s enforcement strategies bore fruit. Leading from the front, Fels managed to instil a zealous appetite among staff for turning the ACCC into a no-nonsense, widely known regulator ‘with teeth’, whose actions were designed to make Australia a more productive and just society. At the same time, Fels maintained a productive relationship with government. Fels was conscious of the longer history of the TPC and the

challenges his predecessors Bannerman and Baxt had faced in securing ongoing government attention, support and financing. Both Baxt and Fels used their active advocacy to shape government competition policy.

Fels' actions, at least initially, impressed the government (contrast Corones et al. 2009: 164–170; with Brenchley 2003: 90–95). Indeed, the ACCC came to be seen as a source of legitimacy for government decisions. For example, on the back of the ACCC's growing enforcement reputation, the new Liberal/Conservative government chose the ACCC to oversee the implementation of their politically important and contentious Goods and Services Tax. This brought more publicity (and government financing) to the ACCC. Fels and the organization played a visible role in advertising and education campaigns about the new tax.

ACCC also invested in its interactions with business and in a range of network engagements. These became increasingly sophisticated and varied over time, such as through Baxt's compliance workshops, cooperation with international competition regulators, and through the consultative committees of the ACCC. These committees traverse the different functional responsibilities of the ACCC and incorporate representatives from affected external actors ranging from businesses, farmers and consumers to a range of legal and financial professionals. ACCC maintains regional offices that keep a local 'ear to the ground.' These structures and mechanisms of engagement with diverse and geographically dispersed actors bring outsider knowledge and perspectives into the organization. It also builds stakeholder understanding of the ACCC's outlook and methods.

Over time, a larger trade practices community both within and outside Australia has developed in support of the ACCC's mission. This community consists of social commentators, legal practitioners, economists, political journalists, consumer law advocates, international organizations (such as the OECD) and former Commissioners and staff. ACCC Chairmen also present public lectures, such as the annual ACCC Chairman's presentation to the Committee for Economic Development of Australia (CEDA), an influential independent think tank.

ADAPTING TO CHALLENGES AND CHANGES

As a competition regulator, the ACCC must contend with at least three potentially undermining factors: the political environment and related

authorization for active enforcement; failure to maintain ongoing refinement of effective enforcement methods supported by legal developments; and inadequate financing to maintain capacity (Fels 2010). The ACCC's institutional armoury, including its integrated approach and established routines for enforcing competition and consumer law, its multi-sector focus, and broad constituency have, to some extent, shielded the organization from budget squeezes or constriction of its licence to operate. Later Chairmen, following Fels, also kept up a determined effort to continue to further evolve Australia's competition law in response to the anti-competitive effects of corporate power.

Nevertheless, Fels' and Asher's aggressive forays into penalizing and publicizing anti-competitive behaviour saw a significant backlash from the business community towards the end of Fels' first term as ACCC Chairman (Brenchley 2003). Big business remains fiercely opposed to any measures that strengthen subjection to competition law which dilutes corporate power and profits. It is no secret in Australia that business associations actively lobby politicians and governments (behind closed doors), have deep pockets for lawyers, and rebuke or delay administrative decision-making (Edwards 2020). Fels in particular was subjected to much vitriol, including from powerful organized interests such as the Business Council of Australia (BCA). This probably contributed to the government offering Fels only a shortened second term, while a number of Commissioners stood down or were 'moved on'.

Fels was succeeded by Graeme Samuel, a merchant banker and former head of the National Competition Council, where he was responsible for negotiating federal-state competition issues in the early years of the national competition policy. Some commentators described Samuel as a selection to appease big business, in particular the strong and powerful lobby, BCA (BCA is long associated with the Liberal party, then in government). A majority of states initially refused to endorse Samuel's appointment, although an eventual compromise succeeded through appointment of a consumer advocate as Deputy Chairperson. In his inaugural speech Samuel made it clear that he would not be a public official that would engage in public lecturing or advocating policy to government. Also, he explicitly committed not to 'trample on' civil and legal rights of business (Samuel 2003). During his period (2003–2011) as Chairman, the ACCC engaged in noticeably fewer and a narrower range of litigation cases (Ergas 2011; Edwards 2020).

However, Samuel made the criminalization of cartel conduct, an initiative first pursued under Fels, a key focus of his term (Samuel 2004). In 2009, the new cartel criminalization regime was introduced by an amendment to the TPA (Beaton-Wells and Haines 2010). This shifted focus in the Enforcement Committee to identifying and pursuing cartel cases. While bringing the prospect of accruing political capital through high-profile successes such as imposing criminal penalties on wealthy executives, focus on cartel cases took resources and distracted from weaknesses in other areas of Australian competition law, in particular mergers and misuse of market power (Beaton-Wells and Haines 2010).

While the ACCC may have reduced the breadth of its litigation activities under Samuel, a quieter pursuit of enforceable undertakings continued and grew in different years of his Chairmanship, with positioning on market power dominance still simmering (Nehme 2008). In both instances, existing routines in the organization and among its external constituency kept the ACCC's enforcement identity and capacities alive, albeit with a different intensity and focus.

In recent years, the ACCC kept growing. Its staff has more than tripled since inception. Its statutory roles and enforcement repertoires have significantly expanded, largely through being proactive in strengthening competition law and developing responses to emerging phenomena (e.g. the rise of social media giants). The ACCC's proactive adaptation also included fostering and attending to new public advocacy groups (e.g. consumer data right initiatives) as a presence in the authorizing environment. Moreover, the ACCC's stature as a competent and stalwart enforcement regulator appears hardly tainted—even thriving—in spite of recognition of the more restrained Samuel's term and ongoing weaknesses in Australian legislation.

A consistent pattern in the ACCC's maintenance of its institutional status has been the ability (inherited from early TPC years) to continue to experiment and push boundaries of the law in different realms of competition policy and in response to new phenomena or different constituencies. It has done this in interaction with the agency's variegated environment. For example, when the ACCC's experts propose new definitions and norms of how and where to apply the law in internally selected strategic cases—and these cases succeed publicly—this then reinforces the ACCC's enforcement status. In that way, a virtuous cycle has been created.

This key self-reinforcing formula of virtuosity seems to have remained consistent over ACCC's lifetime. Though varying with different leaders,

there have remained established traditions of publicly demonstrating the significance of ACCC's functions, not just to corporations but also to vulnerable groups and, more generally, the everyday experiences of citizens.

The ACCC has proactively pursued developments in the law. Examples include acquiring enforceable undertaking powers, increasing financial penalties, criminalization of cartel behaviour, the introduction of 'effects' test, and functions pertaining to social media and data rights. The internal capacity to pursue these adaptations has been bolstered by diverse regulatory instruments, ongoing influx of new and more diverse expertise through graduate programs, and the gradual expansion of the range of actors represented in ACCC's management structure and committee system. Examples of the latter include the creation of a Consumer Data Rights Consultative Committee and incorporating small business experts among commissioners. All these refinements to ACCC internal and external capacities are facilitated by the quality, integrity and continuity among leadership. In particular the strong and facilitative commitment both Fels and Sims lent to building and connecting ACCC's internal mission culture with their external success, celebration and focus.

THE ACCC'S 'MISSION MYSTIQUE': LESSONS FOR REGULATORY INSTITUTION-BUILDING

The preceding sections describe the origins and institutionalization of the ACCC, drawing from Selznickian concepts presented in the Editor's introduction. These concepts, such as building a distinctive identity (here as a combative regulatory enforcement machine) and external legitimacy, are further broken down and transposed by Goodsell (2011) in his categorization of features of 'mission mystique' (the qualities which set institutions apart from mere organizations). In Table 13.1 we summarize our findings about the ACCC according to Goodsell's mission mystique.

Twenty-five years after its creation, the ACCC has attained a strong foothold in Australia's public sector. It is widely respected and recognized as an enduring institution. As the ACCC enters new terrain for competition law such as social media and platforms, it continues to grow and command respect from government and consumers alike. A most powerful demonstration of the recognition of ACCC's ongoing success within its environment has been the recent lauding of the ACCC's enforcement efforts against large corporations by Australia's

Table 13.1 The mission mystique of the ACCC

	<i>Prime qualities</i>	<i>Essential elaborations</i>	<i>Temporal aspects</i>
A purposive aura	Enforcing competition and consumer law to promote competition, productivity and fair trading (1995), to enforcing competition and consumer law to make markets work for consumers	Regulating competition and consumer welfare for the continued growth of Australia's economy and prosperity	An active enforcement agency and expert advisor
Internal commitment	There is a longevity among staff and at the same time the organization attracts motivated young graduates	A strong 'cadre' of experts and professionals including lawyers, economists, consumer advocates. A commitment to moral integrity and anti-collusive behavior	Maintains internal and external rituals of Chairman reports, public lectures and jubilee recordings/other documentation of organizational history. The history is known and accessible staff and even parts of the Australian public
Sustaining features	There is robust internal deliberation of strategic decisions. External legal strategies must survive critique of the courts and elite debates among the 'Trades Practices Mafia', e.g. journalists, lawyers, expert policy makers, former staff	The formal legal basis of the agency's statute, reference to court judgement and other features of design present some insulation from political interference. The agency's expertise and ability to perform has to date assured financial capacity	Ongoing stretching and experimentation with boundaries of law. Agency leadership and its embedding in international community gives capacity to foresee and develop new responses to changing economy and society. The agency is propulsive in some determinations

Source Based on Goodsell (2011)

Banking Royal Commission, and the ‘third term’ appointment of current Chairman Rod Sims.

This chapter has sought to indicate why the ACCC is an institution and identify some of the processes that have reinforced, and continue to reinforce, its institutional status. A key argument in the present account is that the ACCC inherited robust routines from its predecessors, which provided ACCC leadership with variety in experience to both build a distinctive internal capacity to respond to and use the configuration of the environment cultivated by leadership, to sustain ongoing institutional status through adapting routines for action.

Early ACCC leadership (with experience from the TPC and competition law) could further consolidate and adapt these routines to contemporary environments. Such traditions and routines are today, to some extent, supported by ACCC’s formal institutional rules and processes, and informal culture and commitment to legal enforcement and experimentation. Examples include the authority granted by the CCA or inclusion of variety in agency formal design, state input into Chairperson appointments, and informal culture and enforcement strategies. Furthermore, traditions and routines are supported by the knowledge gained through relationships that the ACCC is embedded within, for example its committee system, international networks of regulators, and media presence. Even though it is not immune to political influence or industry counter-reaction, evidence of collusion is limited, and an organizational buffer is created through ACCC’s broad constituency and commitment to its mission. The organization has had failures and periods or cases where its effectiveness has seemed in jeopardy. Yet, to date, the ACCC’s ‘mission mystique’ (Goodsell 2011) has proved stronger than these incidental strains and setbacks.

REFLECTIONS

After decades of anti-competition policy and legislation, and especially after 40 years of the ACCC, there are highlights that may provide useful points of reflection for other public regulatory agencies hoping to gain institutional status. Chief among these are for leadership to have an awareness of the historical inheritance of the organization and the available resources these present both for enhancing internal capacity for regulatory mission and securing external legitimacy.

In the case of the ACCC, inheritance attributes that brought and protected ongoing institutional reinforcement include: formal insulation of expert and strategic decision-making from partisan influence, variegated internal regulatory instruments and external constituencies that can be mobilized to adapt to new environments and, leaders able to connect the value and focus of internal agency mission to external constituencies. ACCC has a strong record of leadership integrity and expertise actively celebrated and acknowledged for pushing the necessary legal and organizational boundaries to maintain ongoing social relevance of the agency's function. This in itself has attracted a stable, impassioned and continuous cadre of organizational experts. We offer a brief reflection on these key findings.

First, the experience and principle of insulation from partisan politics or direct political control is hardly a unique observation in regulatory scholarship or the ACCC (Kovacic and Winerman 2015), but it is insightful to appreciate the historical origins in this case. ACCC formed in a powerful central government department, the Treasury, yet its precedents (TPC) in the Attorney-General's Department provided it time to accumulate internal capacities for data and evidence collection, and legal prosecution, in (legal) practices establishing a norm of protecting the public interest independent of government. Both the skills and values of enforcing competition law in the 'public interest' were institutionalized as values in themselves distinct from the whims of the shorter terms of specific governments.

While the establishment of these earlier routines were, of course, never totally insulated from outside forces or interests, an internal precedent and mission was set for holding firm on law enforcement. Later insulating this mission would also be formalized in the ACCC's design which includes a statutory basis for the ACCC's function, ongoing adjudication by courts (not government), and in state input into Chair and Commissioners appointments. One weakness noted in this case is that the ACCC's legislation allows the government to shorten Chairman/Commissioners length of tenure.

Second, the variegated nature of both ACCC's regulatory instruments and tasks—from the CCA itself, to advice functions and the use of the regulatory pyramid—and its broad, diverse constituencies provide agency leadership ample fodder for responding to environmental demands. While it maintains a cohesive mission 'to enforce competition law', the ACCC undertakes this across numerous sectors and has a sophisticated array of

instruments to respond to and anticipate offences. From tough sanctions, to education, bringing public attention to corporate misdemeanours or requiring normative not just financial retribution, the ACCC is able to tailor a raft of measures to obtain acquiescence or normative agreement on compliance. The range of sectors for which it has responsibility also acts against establishing 'special relationships' with particular industries that could lead to accusations of collusion. Relatedly, the early inclusion of consumer law into Australian competition legislation has from the outset ensured a more 'grassroots' constituency for the ACCC. This creates momentum within the organization to ensure that understandings of the 'public interest' are kept relevant and grounded to the domestic life and values of the citizenry, rather than simply that of corporations or economists.

Together, all this variety brought together for the mission of 'enforcing competition law' is a resource for the ACCC to conserve its institutional status. As was seen in the chapter, the external consultative and public appearances of ACCC representatives and its committee system provides a means for the organization to maintain a diverse network. Again, variety in both tasks and constituencies can insulate against political interference, or provide different outlets for maintaining institutional success despite challenges in some parts of the environment. Lessons for other regulators might include how to foster diversity in their environment in a way that can temper the influence of powerful interests or threats to institutional status.

Third, the case of the ACCC provided important examples of leaders connecting and demonstrating the value of the internal operations of the agency with external focus and achievement. Professor Fels in particular facilitated a virtuous cycle of law enforcement through internally ramping up the strategic focus of enforcement strategies, while at the same time reinforcing this through external shaming and threats to corporate offenders. Simultaneously, he also publicly celebrated enforcement successes, where both public proclamations sought to accrue legitimacy to a broad external public and motivate his staff. In combination with ongoing experimentation with the law and extending the boundaries available to the ACCC for obtaining corporate compliance, this leadership strategy seeks to discipline and channel ACCC's wider institutional nexus to the agency's capacities and mission.

QUESTIONS FOR DISCUSSION

1. How can variety in an institution's historical experience provide resources for agency leadership to ensure it adapts to new environments?
2. What are the pros and cons of an agency having a broad constituency—in case of the ACCC both consumers and external experts—from the point of view of building and maintaining institutional legitimacy?
3. How does the presentation of an institution's success impact the commitment of its members, and, under what conditions might certain forms of external celebration and branding undermine internal commitment to mission?
4. What would the ACCC need to consider in order to effectively balance the very different expectations of community, business and governments and still maintain its institutional status?
5. What might happen to the ACCC institutional aura if a new Chairperson were to step into the ACCC proposing a radical overhaul of its suite of enforcement strategies?

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