

The Secretary
Senate Foreign Affairs, Defence and Trade Legislation Committee
Parliament House
Canberra ACT 2600

Dear Secretary

Thank you for your invitation to make a submission to the Committee in relation to its consideration of the Australian Trade Commission Legislation Amendment Bill 2006. I have been away from Canberra, and did not see your invitation until 13 April. I hope this slightly late response will be acceptable.

I need to say at the outset that, while I have been interested in, and written about, statutory authorities since the time of the Coombs Royal Commission on Australian Government Administration in the 1970s, I have not done any detailed research on the subject of the Australian Trade Commission (hereafter Austrade). I assume your invitation arises from the fact that I have recently published critiques of the Uhrig Report on the Corporate Governance of Statutory Authorities and Office Holders, and my submission is made in that context. My criticisms are to be found in:

- "Statutory Authorities, The Uhrig Report, and the Trouble with Internal Inquiries", *Public Administration Today* (a journal of the Institute of Public Administration Australia), issue 2, Dec/Feb 2004/05, pp 62-76.

- "Parliamentary Oversight of Statutory Authorities: A Post-Uhrig Perspective", *Australasian Parliamentary Review* (journal of the Australasian Study of Parliament Group), 20(2), Spring 2005, pp 39-63.

The Uhrig Review has been fairly widely criticised. In the second of my articles noted above, I sought to identify the main lines of criticism, and a copy of the resulting list is appended as Appendix 1 (references in the article itself). In the present context, it is significant that Austrade was not one of the so-called Uhrig 8, to which the review was directed to give particular attention (see Appendix 2), and that it received little if any notice in the Report. Even the favoured 8 failed to get what I would describe as serious case-study treatment. The report dealt in broad generalities, being seemingly driven by (a) political/bureaucratic argument about the need to discover "whole of government" solutions to administrative problems, and (b) a single-minded focus on enhancing ministerial power that virtually totally excluded any recognition that units of administration required by their creating statutes to operate with a degree of autonomy need some protections against unwise/inappropriate ministerial interventions.

To familiarise myself with the circumstances of Austrade, I have read the Explanatory Memorandum for the present bill attached to your letter of 7 April, gone back to the second reading speech for the 1985 bill that led to its establishment (*Com. Parl. Debs*, HoR, 11 October 1985, pp 1924-1929), and looked at the Austrade website material on the present board. I have not seen the current bill, but doubt whether that would provide a clearer explanation of the matters itemised below.

I have no idea whether the proposed changes are supported by the present board and management, so that these comments are offered in a totally independent way, based solely on a long study of statutory bodies generally.

1. Purpose: While the statement is made that the intention is "to improve governance and accountability in the Australian Trade Commission", no real evidence is offered to establish that that will be the effect apart from broad reliance on the Uhrig Report.

2. Abolition of the board: This is consistent with the Uhrig view that statutory bodies brought under the Executive Management Template should not have boards, but I find no particular explanation of why the change is necessary in this case. The reasoning for establishing the board in 1985 was explained thus:

- (1) obviously in this particular context given that most stakeholders were private sector people, "the interaction between the public and the private sectors is such that the efficiency and effectiveness of one sector is highly dependent on the efficiency and effectiveness of the other" (p.1924);

- (2) extensive consultations had been held "with a broad cross-section of business leaders and major industry organisations on the proposed structure and activities of the Commission" prior to firming up the organisational pattern (p.1926);

- (3) "very significant benefits will come from the guidance of a board of directors drawn principally from the private sector" (pp.1925-26); and

- (4) Austrade will be "managed by a board of a commercial character" (p.1928).

It is ironic that that was the reasoning of a Labor government, and that it is now being overturned by a Coalition government which so often seems to be more supportive than Labor of private sector influences. In my view, a better explanation of the need for change is needed.

I am also puzzled about board displacement. The Explanatory Memorandum is clear on the change from Managing Director to CEO, and on changing staff conditions. But it does not say what will happen to current board members, and Item 8 on p.27 seems to offer them some after-life. At first I thought that there must be an intention to retain the board in an advisory capacity, but that is not clear from the Explanatory Memorandum.

3. Body corporate status: Establishment as a body corporate was justified in 1985 in order that the Commission would "have sufficient flexibility and independence of management to respond quickly to changes in international market conditions" (p.1925). I find no argument here to show that there are changed conditions that invalidate that reasoning.

4. Ministerial directions: The new provisions seem consistent with a change from the CAC to the FMA Act, as explained at p.9 of the Explanatory Memorandum, and with Uhrig thinking. However I think the old provision restricting the minister's power to intervene in particular contracts was a good one, and as on other matters do not see that the need for change has been sufficiently explained.

5. Bringing the staff under the Public Service Act: I see no particular problem with this, but think the Explanatory Memorandum is incorrect at p.10 in attributing this to a Uhrig recommendation. I do not believe Uhrig was interested in this issue – rather it was added to the reform agenda by Public Service Commissioner Lynelle Briggs: see her article "Bringing agencies into the APS fold" in the *Canberra Times* publication *Public Sector Informant* for June 2005.

5. Issues of terminology:

a. Second para of your letter: Yes, if this change is carried through, it will become a "statutory agency" under the 1999 Public Service Act. But it will still be a "statutory authority". Statutory agency is a term peculiar to the Australian Commonwealth, introduced in this legislation as a way of making sense of a variety of uses of "agency", the others here being (a) departments as agencies and (b) executive agencies. "Statutory authority" remains in use widely, internationally, and in Department of Finance and Administration classifications which recognise statutory agency as just one form of statutory authority.

b. I think the continued use of "Australian Trade Commission" will cause confusion if the board is eliminated and it becomes a single-headed statutory body under a CEO. There seems to be no problem in referring to such single heads elsewhere as "Commissioners", eg Commissioner for Superannuation, Commissioner of Taxation. I don't think we now refer to senior overseas trade representatives as "trade commissioners", so there should be no ambiguity if this were done here.

Yours sincerely

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PS: I am faxing a signed copy.

Appendix 1: SOME CONCERNS RAISED BY UHRIG'S CRITICS

- The report is full of jargon and clichés (Gourley 2004) and has an 'abundance of (unacknowledged) normative theory' (Bartos 2005a: 96).
- It was prepared with inadequate consultation, and inadequate attention to relevant academic literature, relevant history and relevant overseas (or even Australian state) experience (Fels & Brenchley 2004, Gourley 2004, Holland 2004: 66, Wettenhall 2004: 65-69).
- Because it ignores the history, it fails to see that these issues have been dealt with previously and that there are already sets of guidelines in existence, and therefore fails to consider why they are not better observed (Gourley 2004, Wettenhall 2004: 67); it offers just 'restatements, clarifications or further procedures to strengthen existing ... arrangements' (Bartos 2004).
- It is just a 'business wish-list' reflecting its origins, and fails to deal with issues such as regulatory timidity and regulatory capture (Fels & Brenchley 2004).
- It draws almost exclusively on private sector models and assumes they are always best, fails to see that the public sector is different in important ways, fails to see that there has been good public sector experience deserving attention, and fails to see that governments are often to blame for problems rather than the statutory authorities and to address that issue (Gourley 2004, Holland 2004: 65, Wettenhall 2004: 66,68).
- It ignores important relevant issues such as probity, ethics and the role of statutory authorities in managing risk (Bartos 2005a: 95), whether statutory authorities should be staffed under the Public Service Act; and how they should be viewed in relation to other forms of non-departmental organisation (Wettenhall 2004: 67).

- Its special concern was with only eight authorities, even that far from case-study treatment, yet it generalises from those eight showing insufficient appreciation of the great variety of tasks performed by statutory authorities (Bartos 2005a: 96, Wettenhall 2004: 66).
- In its views about boards and board and CEO appointments, it fails to appreciate their vital political importance to ministers and to community interests seeking representation (Bartos 2005a: 96, Wettenhall 2004: 70).
- Without seeming to understand, it projects huge new problems for portfolio secretaries (Bartos 2005a: 98).
- It was an inquiry internal to the government, not in any sense an open *public* inquiry (Wettenhall 2004: 70-72).

Appendix 2: 'THE UHRIG 8'

Australian Competition and Consumer Commission (ACCC)

Australian Postal Corporation

Australian Tax Office

Australian Prudential Regulatory Authority (APRA)

Australian Securities and Investments Commission (ASIC)

Centrelink

Health Insurance Commission

Reserve Bank of Australia