The Australian

Regulate the regulators

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WHAT this country needs from its regulators is rules, not roulette. Nowhere is that need greater than at the Australian Competition & Consumer Commission. With Graeme Samuel's departure, it's time to bring to the ACCC disciplines the Rule of Law Association of Australia has long called for.

The questions surrounding Samuel's tenure highlight why those changes are required.

His appointment by the Howard government came in the wake of a strident business campaign against Allan Fels's tough pro-consumer stance. The change in leadership quickly made itself felt.

Actions on behalf of consumers dropped off sharply. In 2002, prior to Samuel's appointment, there were 29 consumer protection litigation actions. By 2006 there were only four. Similarly, in 2002 alone there were seven litigation actions on behalf of small business for unconscionable conduct; in the next four years there were only two.

There were also fewer cases against big business for anti-competitive conduct. Samuel argued the courts had made these impossible, but the ACCC had succeeded in proceedings involving Universal Music, Baxter Healthcare, Woolworths-LiquorLand and Safeway, all cases launched under Fels.

At the same time, the administration of the merger laws became ever more unpredictable. Transactions that seemed likely to substantially lessen competition, such as AGL's acquisition of the Torrens Island power station in South Australia, were approved.

In contrast, mergers that should have been straightforward, such as Angus & Robertson's acquisition of Borders, met strong resistance, with the ACCC initially claiming those booksellers, since destroyed by internet shopping, faced little competitive constraint.

True, the ACCC moved to release greater information about its merger decisions. But welcome though that was, its statements often did little to explain the decisions themselves. Moreover, changes to the ACCC's merger guidelines expanded the commission's discretion.

The Metcash case suggests that, at times, merger clearance seemed to be a process in which Samuel would shift seamlessly from umpire to player, judge to partisan.

As Samuel came up for reappointment, the election of the Rudd government in 2007 changed the political winds. The ACCC moved with them, not only in the FuelWatch debacle but also as the champion of the ill-judged GroceryChoice

website.

No less troubling was Samuel's role in the National Broadband Network.

Bad enough that he publicly endorsed the venture before any details were available; but how can one explain Samuel's conduct in tabling a statement supporting the NBN in Senate hearings without mentioning the longer ACCC document from which that statement was largely drawn, a document that qualified, when it did not contradict, Samuel's claims?

Additionally, Samuel rightly argued in speeches to regulators overseas that competition agencies should be fearless public advocates against government policies limiting the competition laws.

How, then, that he had nothing to say about the government's move to exempt the NBN from those laws, the first such exemption of any significance since the Hilmer reforms of the mid-1990s?

Of course, the immediate issue is whether Samuel's parting gesture will be to lead ACCC approval of the deal between Telstra, the government and the NBN. No doubt Telstra, like the big miners, got its shareholders an excellent outcome from a desperate administration. And no doubt the deal is also good for the government, as it shifts the billions of dollars in costs on to taxpayers years hence. But the deal is hardly rosy for consumers, eliminating what would otherwise have been vital competition, notably from Telstra's existing cable network. The fact that the ACCC recently found that network far superior to Optus's, and capable of upgrading at very low cost, makes it even clearer that the agreement is anti-competitive. So does the fact that once the deal goes through, Australia will be unique in having re-established a government-owned network monopoly.

Samuel says the deal, whatever its drawbacks, will deliver the "greater good" of structural separation. But the government and NBN Co have stressed that deal or no deal, the NBN will proceed as a structurally separated wholesale carrier. And both the McKinsey-KPMG implementation study and NBN Co's business plan find that deal or no deal, Telstra's competitors will shift to the NBN, eliminating any market power Telstra might have over its rivals.

As a result, any benefits from structural separation will largely arise both with and without the agreement. And that is crucial, for one could fill a room with ACCC and court decisions holding that where the claimed benefits from an anti-competitive agreement will occur in any event, those benefits are irrelevant to the commission's valuation of the agreement.

There is therefore little doubt that the ACCC, if it acted in line with long-established rules and its own precedents, would knock the agreement back. Yet Samuel seems set to let it through.

None of this is to downplay Samuel's commitment to enforcing tough laws against cartels. Nor is it to dispute that ultimately, a full evaluation of Samuel's tenure is a matter for history. But whatever history's verdict, the performance of agencies such as the ACCC should not depend so heavily on the vagaries of government appointments.

Rather, we need effective checks and balances, including chairs appointed for a single term only, consistent disclosure of financial interests, more stringent parliamentary scrutiny, periodic Productivity Commission audits, and merits review of major decisions.

That there are important choices Australians would rather vest in independent regulators than in politicians is fully understandable. But the trend to government by the unelected is itself fraught with dangers.

Unaddressed, those dangers could lead all too readily to the rule not of laws but of political convenience. Leaving our regulators unregulated should no longer be an option.