Chapter 2

Preventing undue influence and maintaining trust

It is important that regulatory decisions and functions are conducted with the utmost integrity to ensure that there is confidence in the regulatory regime. This is even more important for ensuring the rule of law, encouraging investment and having an enabling environment for inclusive growth built on trust. This chapter explores the ways of protecting regulators from undue influence, including through establishing independent regulators, and the considerations for assuring certainty in the regulatory system.
## Principles for preventing undue influence and maintaining trust

**Preventing undue influence**

1. Independent regulatory decision making at arm’s length from the political process, is likely to be appropriate where:
   - there is a need for the regulator to be seen as independent, to maintain public confidence in the objectivity and impartiality of decisions;
   - both government and non-government entities are regulated under the same framework and competitive neutrality is therefore required; or
   - the decisions of the regulator can have a significant impact on particular interests and there is a need to protect its impartiality;
   - the autonomy of regulators (organisational, financial and decision making) situated within a ministry should be safeguarded by provisions in their empowering legislation.

2. All regulators should operate within the power delegated by the legislature and remain subject to long term national policy.

3. New or major policy decisions should be justified by the regulator based on an empirical basis and in the light of evaluation of previous measures, and the reasoning should be made publicly available.

4. Regulators shall conduct horizon scanning of potential major issues and give prior notice to regulated entities and the public of any new major policy initiatives and allow reasonable period for genuine comment by stakeholders, as well as feedback from the regulator.

5. Board members, senior staff and staff on secondment should not be involved (recused) in any decisions that affect previous employers.

6. In cases where exceptions are made to a regulated entity, this should be notified to all regulated entities, the public, minister and legislature.

**Maintaining trust**

7. Where legislation empowers the minister to direct an independent regulator, the limits of the power to direct the regulator should be clearly set out. The legislation should be clear about what can be directed and when. Any direction made by the minister or politicians should be documented and published. In the case of economic regulators, it is preferred that legislation should not permit powers to be directed by ministers.

8. Any communication between the minister, the ministry and an independent regulator should occur in a way that does not compromise the actual or perceived independence of regulatory decision making.

9. The criteria for appointing members of a regulator's governing body, and the grounds and process for terminating their appointments, should be explicitly stated in legislation. The process should involve the legislature or judiciary for greater transparency and accountability.

10. Government and or the legislature (parliament/congress) should establish and publish for each regulator a policy (such as cool-off periods) relating to post-separation employment of senior regulatory staff and members of the regulator’s governing body.
Importance of regulatory integrity

A high degree of regulatory integrity helps achieve decision making which is objective, impartial, consistent, and avoids the risks of conflict, bias or improper influence. The nature of some regulatory decisions can at times involve higher risks to the integrity of the regulatory process, for example, due to pressures from the affected interests or the contentious and sometimes politically sensitive nature of the decisions.

Establishing the regulator with a degree of independence (both from those it regulates and from government) can provide greater confidence and trust that regulatory decisions are made with integrity. A high level of integrity improves outcomes of the regulatory decisions. Regulators should have provisions for preventing undue influence of their regulatory decision-making powers and maintaining trust in their competence and delivery.

Independence of regulators

It is important to consider how regulatory integrity will be protected through the external governance arrangements of the regulatory body. All regulators’ decisions and activities should be objective, impartial, consistent and expert. There is no generally agreed definition of what characteristics make a regulator “independent”. The United Kingdom’s Better Regulation Taskforce (2003) developed its own definition of an independent regulator as:

A body which has been established by Act of Parliament, but which operates at arm’s length from government and which has one or more of the following powers: inspection; referral; advice to a third party; licensing; accreditation; or enforcement (p. 6).

This raises the question of what is meant by “arm’s length”, and in these principles this is taken to mean the regulator is not subject to the direction on individual regulatory decisions by executive government, but could be supported by officials who are located within a ministry or have its own staff.
There are also different institutional models of independence and some independent regulators are entirely independent from national governments and ministries. Many sectors in the EU have independent regulators as described in EU law. For instance in the electronic communications sector articles 3.3 and 3.3a of the Framework Directive 2002/21/EC, as amended by Directive 2009/140/EC. Therefore in some jurisdictions the concept of an independent regulator refers to an even higher degree of independence as is described in these principles. The application of these principles should take these different contexts into consideration.

Establishing the regulator with a degree of formal independence both from those it regulates and from government can provide greater confidence that decisions are impartial.

Enshrining a regulator’s independence in legislation does not guarantee that the regulator’s behaviour and decisions will be independent (Thatcher, 2002; 2005). A culture of independence, strong leadership and an appropriate working relationship with government and other stakeholders are essential to independent regulatory behaviour. The political history and context that regulators operate within may be more culturally attune toward cultural independence, or not as the case may be. Nonetheless, formally protecting the independence of regulators as discussed in this chapter is an important, if not sufficient, element of achieving independence (Gilardi and Maggetti, 2010).

When a separate regulatory function is established, consideration should be given as to whether the regulator is set up under statute outside ministry structures (while still being accountable to a minister) or is set up as an administrative unit of a ministry. In practice, independent regulators need to have the internal capacity to support the governance arrangements needed to guarantee accountability and transparency, and so there should always be consideration as to whether any new regulatory function, or one subject to review, can be better placed with an existing entity.¹

Any consideration of independence should emphasise that a regulator’s “independence” from government can never be absolute, but is a matter of degree and nature. However a regulator’s level of autonomy will ultimately assist to maintain the perceived trust by the regulated entities of the regulatory decisions made. A regulator’s powers (including the power to raise funds) are always derived from the legislature and are to a greater or lesser extent subject to the direction of ministers. A number of factors can determine the degree and nature of a regulator’s independence. These are discussed further in this chapter.
2. PREVENTING UNDUE INFLUENCE AND MAINTAINING TRUST

When is an independent regulator most appropriate?

A threshold issue is the question of whether particular regulatory decisions are best made by an independent regulator or by the minister or an officer of the ministry. According to the OECD 2012 Recommendation of the Council on Regulatory Policy and Governance, independent regulatory agencies should be considered in situations where:

1. there is a need for the regulator to be seen as independent, to maintain public confidence in the objectivity and impartiality of decisions;
2. both government and non-government entities are regulated under the same framework and competitive neutrality is therefore required; or
3. the decisions of the regulator can have a significant impact on particular interests and there is a need to protect its impartiality.

In these three cases, regulatory integrity is very important and there is likely to be a high level of risk (or perceived risk) to the independent regulator’s integrity. Therefore, a substantial degree of independence and distance from executive government is generally warranted.

An independent regulator is important to enhance regulatory certainty and stability. This is more prevalent where the regulator is a market regulator as in such cases the government itself may be a stakeholder e.g. as a shareholder or market player, and therefore there is a greater need for an independent regulator.

Box 2.1. Examples of independent regulators

Germany’s Federal Network Agency for Electricity, Gas, Telecommunications, Post and Railway (“Bundesnetzagentur”) is an example of a highly independent regulator for all regulated sectors (cf. also the Regulatory Management of Network Sectors section of the OECD Product Market Survey 2013, which inter alia examined the electricity, gas and telecom sectors).

Its independence is stated explicitly in the law (§ 1, Gesetz über die Bundesnetzagentur für Elektrizität, Gas, Telekommunikation, Post und Eisenbahnen), it has no dominant source of funding, and the regulator cannot receive instructions or guidance from government on its strategy, individual cases or appeals. The regulator’s decisions can only be appealed in court in the final instance.

The extent of the risk and the extent of independence required will inform decisions about whether the most appropriate location for the independent regulator’s supporting staff is within a ministry or a separate body (see Figure 2.1).

**Figure 2.1. Regulatory integrity, independence and the institutional form**

<table>
<thead>
<tr>
<th>Risk to regulatory integrity</th>
<th>Low</th>
<th>High</th>
</tr>
</thead>
<tbody>
<tr>
<td>Secretary or delegate makes regulatory decisions often on behalf of the minister</td>
<td>At arm’s length regulatory decision maker</td>
<td>Independent regulatory decision maker with supporting mechanisms</td>
</tr>
</tbody>
</table>

1. Supporting mechanisms include: the regulator having direct control of its staff through employment, or alternatively via a Framework Agreement with the head of a Ministry and Minister; provisions that affect the regulator’s tenure; explicit restrictions on direction; funding arrangements, etc.

Regulatory integrity is linked to achieving better outcomes. Some regulators who operate in rapidly changing regulatory environments have to be adaptable to responding to the varying situation. This is effectively managed through having the trust of the regulated entities in the decisions and interventions that the regulator makes.

Decisions on the extent of independence required will depend on what is being regulated, judgement about how that is best regulated and whether a particular institutional form best fits the nature of the regulator’s activities. For some types of regulatory decisions, the trust of regulated entities and the wider public is best engendered by demonstrating that these decisions are shielded from perceptions of political influence (Christensen and Laegreid, 2006; Meloni, 2010).

In some cases it will be clear that a legally independent and structurally separate regulatory body is needed, while in others it will be a matter of judgement. Factors to consider are set out in Table 2.1.
The assignment by the legislature of powers to independent regulators allows for regulatory decisions to be made independent of political influences, but within the accountability framework established for the regulator.

**Table 2.1. Factors to consider in creating an independent and structurally separate regulatory body**

<table>
<thead>
<tr>
<th>Factor</th>
<th>Description</th>
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</thead>
<tbody>
<tr>
<td>Credible commitments over the long term</td>
<td>Establishing a more independent regulator can send an important message to regulated entities about the commitment of government to objective and transparent administration and enforcement of regulation.</td>
</tr>
<tr>
<td>Stability</td>
<td>Greater distance from political influences is more likely to result in consistent and predictable regulatory decision making.¹</td>
</tr>
<tr>
<td>Addressing potential conflicts of interest</td>
<td>Regulatory decisions that have significant flow-on impacts for government, e.g. on budgets or service delivery, or that must be seen to be applied impartially to both government and non-government entities may be better made by entities at arm's length from ministers and ministries.</td>
</tr>
<tr>
<td>Development of regulatory expertise</td>
<td>Where there is a need for specialist regulator expertise, which is best maintained in a specialist unit with quarantined resources.</td>
</tr>
</tbody>
</table>


The underlying objective of establishing a regulator as an independent entity is to mitigate and manage any risks or perceived risks to regulatory integrity. A high degree of independence and properly constructed accountability mechanisms are mutually reinforcing. Regulators that are given more power and autonomy in their decisions also need to be more accountable to government and the legislature for the ways in which they have exercised that power. Strong accountability mechanisms for independent regulators, who are neither elected nor directly managed by elected officials, allow their ministers and the legislature to assess whether the objectives set for them are being achieved efficiently and their powers exercised with integrity. These issues are discussed further in Chapter 4.
Box 2.2. Authority for Consumers and Markets, Netherlands

The Authority for Consumers and Markets (ACM) in the Netherlands is formally an autonomous administrative authority without legal personality. It operates under the Framework Act for autonomous administrative authorities (“Kaderwet Zelfstandige Bestuursorgane”). According to this Act only the Board of ACM is the autonomous administrative authority. The minister provides staff to the autonomous administrative authority. The Framework Act ensures that the staff that is employed by the Board of ACM is empowered only by the Board. The employed staff is only accountable to the Board. The staff is not allowed to seek instructions of the minister; neither can the minister give instructions to the staff employed by the Board of ACM. Crucial conditions for independent staff are therefore guaranteed by law.

Legislation alone is not sufficient to guarantee an independent regulator. Internal governance plays an important role. Therefore ACM regards independence explicitly as one of its three core values. The other core values are openness and professionalism. These core values form the basis of all of ACM’s actions.

In practice, the independent position of ACM as an organisation means, on the one hand, taking a critical attitude and exercising independent judgments, and, on the other, maintaining open and constructive relationships with ministries, other regulators and stakeholders.

Source: Authority for Consumers and Markets (2013), Netherlands.

When is a ministerial regulator more appropriate?

Some regulatory decision making will clearly benefit from being undertaken within a structurally separate independent regulator, but in other cases the advantages of such independent decision making are outweighed by the disadvantages of decisions being made outside the ministry.

Regulatory decisions may be better made by the minister, or by ministry officials under the oversight and direction of the minister, where one or more of the following factors set out in Table 2.2 are present (Victorian government, 2010).

Where the regulator is located within a ministry, varying degrees of independence from ministerial direction can be achieved through the design of the regulatory scheme. For example, the legislation may allow the minister and ministry management to have close involvement in operational policy and the regulator’s strategy, but contain an explicit provision prohibiting anyone, including the minister, from directing individual ministry decision makers with regard to certain decisions; thereby granting a limited degree of independence.
Table 2.2. Factors to consider in creating a ministerial-based regulatory scheme

<table>
<thead>
<tr>
<th>Factor</th>
<th>Description</th>
</tr>
</thead>
<tbody>
<tr>
<td>Closely integrated function</td>
<td>The regulatory function must be closely integrated to ministry activity which retains the focus of specialist knowledge and expertise within government</td>
</tr>
<tr>
<td>Changing regulatory environment</td>
<td>The environment being regulated is subject to rapid change, with policy still being developed. Regulatory decisions cannot be readily separated from policy choices that are appropriately made by people under the direct control of elected ministers</td>
</tr>
<tr>
<td>Minor function</td>
<td>The regulatory function is incidental to non-regulatory ministry activities, such as service delivery. Creating a separate entity to perform the function, or assigning it to an existing independent regulator, is not justifiable</td>
</tr>
</tbody>
</table>

**Allocating the power to make regulatory decisions**

Some legislation allocates the power to make regulatory decisions to the minister, while other legislation allocates primary decision-making powers to a position defined in statute that may be held by the head of a ministry or another public official within the ministry. In any of these situations the decision maker may have power to delegate his or her decision-making powers, fully or in part.

Where a regulatory decision involves value judgements (that may be informed by independent, expert advice) it may be most appropriate for the decision to be allocated to a minister who is directly accountable to the legislature. For example, controversial planning decisions involving weighing up policy objectives are typically made by elected councillors or by a minister. In contrast, decisions with objective decision criteria, even if they require a degree of judgement, may be most appropriately allocated to a public official. Where technical or legal expertise is needed, and the decision maker is not an expert, it should be provided in the form of advice, and the appropriate institutional mechanisms should be provided to allow for this.

The formal location of the power may have substantive legal consequences. For example, the Australian courts have reviewed ministerial decisions on a different basis from that on which they have approached decisions of public officials. Second, a public official acting under delegated powers would have less formal autonomy in exercising those powers, than if he/she was exercising powers assigned directly to the position he/she held under statute (see next section on delegation).
Consequently, it is important to consider these issues when designing regulatory schemes where the decision makers are expected to sit within ministries.

**Preventing undue influence**

There are many reasons why different parties may wish to influence the decisions of regulators. Whether the gains are political, financial or any other, regulators will face pressure from those trying to have a more favourable decision, in whatever terms, for their benefit. Even if there has been no influence, if a decision is taken that is unfavourable to a set of stakeholders or regulated entities, then there can still be the perception that a decision has been unduly influenced.

Regulators can avoid actual or perceived influences by simply being more open and transparent about their decisions. Decisions based on empirical evidence or research, post-implementation evaluation and stakeholder input can help build confidence and trust in those decisions. Making such justifications or the reasoning behind the decision open to full public scrutiny is important to achieve not only good regulatory outcomes but also support more fundamental issues such as the rule of law.

In a similar way, regulators often investigate future issues to potentially address through horizon scanning exercises. Sometimes regulators grant special exceptions to regulated entities for good reasons (such as exemptions and grace periods). These should all be communicated along with any new major proposals that will have an impact on regulated entities to the regulated entities, the public, ministers and legislature. These steps will limit the likelihood of regulated entities being surprised by a decision, new regulations or intervention. It can also address potential accusations of decisions being made due to favour of one party over others.

Finally the potential for staff members of regulatory agencies to be influenced or be accused of being influenced should be removed. Recusals or disqualification of members of the board, senior staff and other staff from being involved in decisions that affect previous employers should be introduced. This will further protect regulators from actual or perceived influence that could be unethical and unfair.
Maintaining trust in decision making

Independence exists within the legislative framework provided for the regulator by the legislature and as noted earlier is always a matter of degree. Structural separation is, however, one important way of reducing risks to regulatory integrity.

The most independent regulators are created through the establishment of separate statutory bodies or positions, with a formal and typically public process for appointment of members of the governing body and with specific enabling legislation governing the regulator’s objectives, functions, powers and accountability. This limits the extent of ministry and ministerial involvement in day-to-day decision making by the regulator. Independence in decision making can also be fostered by a number of other means including:

- operational clarity (see introduction);
- clear articulation of decision-making power in legislation;
- clarity about requirements for reporting to the minister;
- definition of the minister’s power to direct the regulator and transparent processes around the issuing of directions (see Chapter 4);
- an adequate resource base (see Chapter 6);
- staffing flexibility – to attract and retain competent specialised staff for certain regulatory functions;
- transparent processes for appointment to governing bodies and chief executive positions;
- explicit provisions covering performance criteria and review;
- explicit conditions and transparent processes for appointment and termination of appointments, including appeals processes; and
- limitations or restrictions on members of the regulator’s governing body accepting employment in the regulated industry after leaving the regulator (“post-separation” activities).

Governance arrangements should ensure that where regulators have a substantial degree of independence they are adequately accountable for their activities (see Chapter 4).
Communication between ministers, ministries, and independent regulators

Defining a regulator’s relationship, responsibilities and lines of accountability to the relevant minister, ministry and the legislature is central to both external governance arrangements and independence. A Statement of Expectations from the minister to the regulator is an important mechanism to achieve this (see Chapter 4). If the independent regulator is accountable to the legislature through a minister, the minister needs to be kept informed about the regulator’s activities. This may involve routine requests from the minister for information, discussions about the handling of correspondence and the like. However, in handling any such request, the regulator needs to be mindful not to compromise the actual or perceived independence of decision making. Therefore, these requests should occur through defined, systematic channels, which are discussed below.

If the independent regulator reports directly to the legislature then there should be some clear and set procedures and mechanisms for instance periodic published reports and meetings.

Communications between the minister (including his or her office) and an independent regulator with a governing board relating to matters where less frequent communication would be expected, such as the regulator’s strategy, enforcement activities or important approval processes, should primarily be via the Chair, whether formally or informally. Communication with the CEO on anything other than routine matters should only be in conjunction with the Chair, in order to both maintain the Board’s ability to provide effective management oversight, and protect the actual and perceived independence of decision making.

Transparency in the instructions from ministers to their regulators is highly desirable as public scrutiny acts to protect regulatory integrity. Where a minister is given power under legislation to issue specific directions to a regulator, the limits of the power to direct the regulator should be clearly set out. Any directions issued should be published in a timely manner on the regulator’s website or other accessible source, and also in the regulator’s annual report.

Independent regulatory decision makers supported by ministry staff

Some independent regulatory decision makers are supported by a secretariat of ministry staff. This can be an efficient and effective means of providing high quality administrative support while allowing the regulator to focus on decision making. It can provide greater independence without constructing a separate statutory body. It can also enable effective information sharing between the regulator’s staff and the ministry, while minimising administrative costs.
However, these arrangements may involve a range of potential risks:

- risks to the actual and perceived independence of decision making;
- risks to the quality of decision making due to the quantity and quality of services provided by the ministry or by the constraints on the regulator’s ability to fully control the resources at its disposal;
- risks of inappropriate information exchange between the staff working with the regulator and other ministry staff; for example, staff involved in decisions relating to funding of external bodies; and risks that staff may be conflicted by apparent differences in the approach or interests of the minister (or ministry) and those of the regulator.

The appropriate arrangements established to support an independent decision maker within a ministry structure, while managing the risks outlined above, depend on the nature of the work and the degree of independence sought, which in turn relates to the risk to regulatory integrity.

*Framework agreement between independent regulatory decision makers and ministry*

Preparing and publishing a framework agreement between the independent regulator, the ministry and the minister that outlines the Secretariat arrangements can be one way to manage these risks. This mechanism is highly flexible, but at a minimum the agreement should cover:

- the overall budget of the secretariat;
- whether the secretariat will be physically separate from the ministry;
- whether the regulator has a corporate identity separate from the ministry;
- how many staff will be assigned to the secretariat;
- who selects the secretariat staff;
- how and by whom the secretariat’s staff’s performance is assessed;
- what information can and cannot be shared between the staff supporting the regulator and other ministry staff;
- what ministry policies cover the operation of the secretariat;
• how broad government requirements, for which ministry heads (Secretary, Permanent Secretary, Secretary-Generals, etc.) are responsible (e.g. administering public records, freedom of information requests, etc.), will be met;

• provision of basic services – legal advice, information technology systems, human resources support, financial management, mail etc.; and

• how the agreement can be amended and how it will be reviewed.

Where it is efficient for the regulator and ministry staff to hold joint meetings with regulated entities, it is important that all participants are clear on respective roles and any protocols about information sharing.

Decisions on any staff movement between the regulator’s secretariat and other ministry functions also need to be made mindful of actual and perceived independence.

### Box 2.3. Appointments in the Federal Institute for Telecommunications of Mexico

Applicants for appointment as commissioners are subject to the compliance requirements of an Evaluation Committee composed of the holders of the Bank of Mexico (Banxico), the National Institute for Educational Evaluation (INEE) and The National Institute of Statistics and Geography (INEGI).

To this end, the Evaluation Committee will convene when each commissioner vacancy takes place and, will decide by majority vote, and will be chaired by the head of the entity with greater seniority who will have the deciding vote.

The Committee will issue a public call to fill the vacancy and, will verify compliance by applicants with the requirements; the applicants that have satisfied these will apply a knowledge test on the subject.

For the theory test, the Evaluation Committee shall consider the opinion of at least two higher education institutions and follow the best practices in the field.

For each vacancy, the Evaluation Committee will send the executive a list with a minimum of three and a maximum of five candidates, who have obtained the highest passing scores. If not completed the minimum number of applicants will be issued a new call. The executive will select from those candidates, the candidate who will be proposed to the Senate for ratification.

Ratification shall be by the vote of two thirds of the Senate present. In case that the Senate reject the candidate proposed by the executive, the president shall submit a new proposal. This procedure will be repeated as many times as necessary. If new rejections happen until only one applicant approved by the Evaluation Committee remarks, the applicant will appointed as commissioner directly by the executive remains.
Box 2.3. Appointments in the Federal Institute for Telecommunications of Mexico (cont.)

For the first commissioners:

In the event that, within a single vacancy, the Senate does not approve the appointment twice, the Federal Executive, will correspond to appoint commissioner directly, from the list of candidates submitted by the Evaluation Committee.

Transparency designations:

The reform states that the procedure call to select commissioners shall observe the principles of transparency, openness and maximum concurrency.

Among others, the reform provides that the commissioners shall not hold any other employment, business, public or private, except for teaching positions.

It is also stated that the law must punish where commissioners have contact with persons representing the interests of regulated operators, to discuss matters of their competence, except in open court in the presence of other commissioners and as part of the procedures.

Source: “Decreto por el que se reforman y adicionan diversas disposiciones de los artículos 6o., 7o., 27, 28, 73, 78, 94 y 105 de la Constitución Política de los Estados Unidos Mexicanos, en materia de telecomunicaciones” (2013).

Depending on the nature of the regulatory decision making, it may be possible for a regulator to operate through a service agreement with the relevant ministry where the regulator predominately requires only administrative staff support, there are low levels of discretion or judgement required of the staff supporting the regulator, and there is no delegation of powers involved. The staff would remain under the direction of ministry management. The agreement would define the nature, quantity and standard of services the ministry would provide the regulator within a specified budget. It may also specify arrangements for the provision of other services such as independent legal advice.

Regardless of the type of arrangement it may also be useful to set out in an agreement the processes for consultation between the regulator and the ministry, processes for renegotiating resource commitments and service levels, processes for co-ordination of decision making with other regulatory functions conducted by the ministry and procedures for resolving issues that may arise from time to time.
The terms of appointment for board members of independent regulators

An important aspect of institutional arrangements that protect the independence of regulators are the provisions relating to terms of appointment of independent board members.

Terms of appointment that span over an electoral cycle is likely to promote independence from the political process. Procedures regarding re-appointment should be mindful of the need to guard against the perception of “capture” by the (re)appointing authority (Department of Public Enterprise, 2000). Term limits can be useful to guard against perceived capture, but must avoid unnecessarily depriving the regulatory system of the useful expertise and experience built up by a regulator. Overlapping terms of board members can be a useful mechanism to both provide continuity of approach and protect independence.

Termination provisions for independent regulators

The independence of regulatory decision making is protected by a range of factors such as administrative law principles (including procedural fairness), but also by the extent of any constraints on arbitrary termination of appointments or removal from office of regulators.

An important informal constraint will often be political, in that a minister will face the scrutiny of the community and the legislature if he or she terminates an appointment and is unable to effectively justify such a decision.

Clear legislative provisions to protect the integrity of the regulatory agency are also important. These should include outlining what constitutes appropriate grounds for removal and, depending on the nature of the regulator’s role, what does not. It should also include the process for removal and any rights of review.

Grounds for termination of members of a regulator’s governing body might include:

- bankruptcy;
- conviction of an indictable offence;
- misconduct;
- breach of the Act he or she is responsible for enforcing;
- absence without leave;
• failure to disclose a conflict of interest;
• engagement in paid employment outside the duties of his or her office without the minister’s consent;
• physical or mental incapacity;
• refusing or neglecting to perform his or her functions or duties; or
• fitness to continue his or her duties.\(^4\)

The more specific the criteria for removal, the more constrained the ability of the government to terminate an appointment.

In some jurisdictions, the independence of a specific regulator is further protected by the inclusion of formal processes involving the legislature relating to termination from office.\(^5\)

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**Box 2.4. Independent regulatory decision making and terminations in legislation**

The Australian Competition & Consumer Commission (ACCC) and the Australian Energy Regulator (AER) are both independent Commonwealth statutory agencies. The Competition and Consumer Act 2010 (the CCA) establishes a Commission and Board as the respective decision-making bodies for the ACCC and AER. The Australian Governor-General may only terminate the appointment of members of the Commission in very limited circumstances, including misbehaviour, physical or mental incapacity (Part II of the CCA). The same criterion applies for the AER (Part IIIAA of the CCA). Commissioners and Board members are initially engaged for five year terms and may seek re-appointment at the conclusion of their terms.

Section 29(1A) of the CCA notes that the relevant Commonwealth minister must not give directions to the ACCC under Part IIIA (Access to services), IV (Restrictive trade practices), VII (Authorisations, notifications and clearances in respect of restrictive trade practices, VIIA (Prices surveillance), X (International liner cargo shipping, XIB (The Telecommunications Industry: Anti-competitive conduct and record-keeping rules) or XIC (Telecommunications access regime). This exclusion covers a significant range of the regulatory activities and responsibilities undertaken by the ACCC.

**Pre-employment and post-separation activities of regulators**

Effective management of actual and potential conflicts of interest is particularly important for regulators. The governing body needs to be mindful of the range of risks that might arise and tailor processes and oversight to minimise them.

Many of the staff and members of regulators’ governing boards will have backgrounds in the industry they are regulating, and in many cases will return to roles in that industry. These staff movements transfer skills and experience between regulators and industry, and can have benefits in:

- building shared understandings of the context within which each is operating;
- helping regulators stay in touch with current operating processes within the industry;
- improving the industry’s understanding and navigation of the regulatory system; and
- improving industry compliance.

Preventing post-employment staff movement to industry can limit regulators’ ability to attract the necessary talented staff, as employment by the regulator would narrow potential later career opportunities (OECD, 2003). However, mandatory time gaps or cooling-off periods between leaving a regulator and taking up a position in the regulated industry may be warranted as conditions of employment in some cases, for example:

- where regulated entities are expected or required to reveal commercially sensitive information to the regulator, and would be less open with the regulator if its staff left to join one of its competitors; or
- where departing staff of a regulator would have knowledge that would hinder the regulator’s enforcement strategy if held by a regulated firm.\(^6\)

Regulators who are approached to work in an industry they are regulating should disclose this fact to their Boards, ministers or legislature and if necessary step aside from their role to ensure there is no conflict of interest.

Staff movements between the regulator and regulated entities, particularly at senior levels, also carry risks to the actual or perceived integrity of the regulator. In this context, when dealing with former colleagues, regulators and their staff need to be particularly careful to ensure
that they can demonstrate they have acted impartially in regard to decisions and the provision of information. However, it may also be worth considering post-separation employment restrictions for staff movements from regulated entities and regulators as well (Adolph, 2013).

Further detail about requirements and processes to protect the integrity of regulators and their staff can be found in OECD (2003a; 2010a).

While it may not be appropriate to mandate a whole-of-government policy providing specific rules relating to post-separation employment, government should establish and publish such specific rules for each regulator.

### Applying the principles – Preventing undue influence and maintaining trust

#### PREVENTING UNDUE INFLUENCE

**Degree of independence**

- Can the regulatory function be effectively performed within a normal ministry decision-making structure, or does it require arm's length distance to protect regulatory integrity?
- Is a degree of independence required? Consider whether:
  - there is a need for the regulator to be seen as independent, to maintain public confidence in the objectivity and impartiality of decisions;
  - both government and non-government entities are regulated under the same framework and competitive neutrality is therefore required; or
  - the decisions of the regulator can have a significant impact on particular interests and there is a need to protect its impartiality.

#### Ministerial regulators

- Regulatory decisions may be formally assigned by legislation to a ministry head (Secretary, Permanent Secretary, Secretary-General, or other specific office holder) or may be formally assigned to the minister and delegated to specified officers of the ministry. Does the legislation clearly specify whether the regulatory decision maker is the minister, the ministry head or a particular ministry officer in each case? Is the rationale for this choice clear?
- Where the minister is the formal decision maker, does the legislation specify which powers officers of the ministry can be delegated or authorised to exercise?
To what extent is structural separation of the regulator from other ministry functions practical, and what other mechanisms can be put in place to support robust decision making?

### Preventing undue influence in regulatory decisions

- Was there an empirical or analytical basis for major decisions? Is the justification publicly available?
- Does the regulator conduct horizon scanning exercises regularly?
- Can the public and regulated entities comment on these? Are they given reasonable time to respond? Is feedback from the regulator provided in response to their comments?
- In the case of exceptional treatment to regulated entities, is this communicated to other regulated entities? If not, why not?
- Is there a recusal clause for all staff and board members being involved in decisions that could be perceived as not being objective?

### MAINTAINING TRUST

- Is there a tradition of regulators whose behaviour is independent of the government of the day?
- What structures and processes will be used to protect the actual or perceived independence of the regulatory decision maker from political or other interests?
- Does the minister have power to give the regulator directions on how it should perform its functions? If so, are these directions published and listed in the annual report?
- Is it clear that the minister does not have the power to direct the regulator on individual cases or decisions?
- Is it clear that independent regulators are not subject to the general direction of a ministry head and/or minister?
- If the regulator is supported by a Secretariat of ministry staff, are there protocols established so the regulator can be supported by those staff, without them facing material conflicts of duties in their work, due to the risk of conflicting directions or dual accountabilities?
- Do the legislative conditions covering termination of the regulator’s board specify conditions and processes to avoid compromising independent regulatory decisions?
- Are there arrangements in place to manage any risks associated with pre- and post-appointment and employment of members of the governing body or staff of the regulator?
Notes

1. Any scale of economies of combining regulatory functions may differ depending on the nature and extent of the function and the industry being regulated. For example, Clive Briault of the United Kingdom’s Financial Services Authority examined the sources of economies of scale and scope from a single industry-wide regulator replacing a multiplicity of separate specialist regulators in *Revisiting the rationale for a single national financial services regulator* (2002) (pp. 16-17).

2. The Australian High Court found that there is a more limited role for the courts in reviewing administrative decisions, where ministers, acting under statutory powers, make decisions on broad policy grounds. Minister for Aboriginal Affairs v Peko Wallsend Ltd (1986), 162 CLR 24 per Brennan, J.).

3. For an example of a framework agreement between an independent agency and a departmental secretariat, see Department of Treasury and Finance and Victorian Competition and Efficiency Commission (2005).

4. For example, appointments of commissioners of the Australian Competition and Consumer Commission shall be terminated if they are bankrupt, fail to disclose conflicts of interest, are absent without leave or engage in paid employment outside their duties without the Minister’s consent. However, they may have their appointment terminated for misbehaviour or physical or mental incapacity.

5. For example, in the Australian state of Victoria, the Chairman of the Essential Services Commission (a utility regulator) and the Director of Transport Safety can only be removed if the relevant minister makes a statement outlining the grounds for removal to each House of Parliament, and both Houses pass resolutions supporting removal.


7. The United States has had legislation relating to post-employment of certain subsequent employment of private employment activities of former federal officers and employees (including regulators) since 1872 (see Congressional Research Service 2012).
