

8 May 2014

Regulatory Institutions and Practices Inquiry
New Zealand Productivity Commission
PO Box 8036
The Terrace
WELLINGTON 6143
Email: info@productivity.govt.nz

Dear Sir/Madam

RE: Draft Report -Regulatory Institutions and Practices Inquiry

1. This submission on the New Zealand Productivity Commission ("**Commission**") Draft Report ("**the Report**") is made by Veda Advantage (NZ) Limited ("**Veda**").
2. The aim which is to improve the design and operation of regulatory regimes over time and ultimately improve regulatory outcomes is a worthy one. Seemingly, achieving better regulatory performance will take time and may require many changes.
3. Whilst the review is not a review of individual regulators, specific regulations or the objectives of regimes it may be useful for the Commission to have a submission made by a directly regulated business. Our experience informs our response to the Draft report.
4. **Veda** is a credit reporter and as such is directly regulated by the Office of the Privacy Commissioner through deemed regulations made under the Privacy Act 1993. Credit reporters are regulated by the Privacy Commissioner through a code of regulations called the Credit Reporting Privacy Code 2004, (the Code), which is issued pursuant to section 46 of the Act.
5. As noted in your report we have this kind of regulator: " Individual privacy-(Privacy Commission, Privacy Act 1993).....Which is an independent Crown Entitythe Privacy Commissioner is a person or body empowered to make rules which has an independent statutory function and is not accountable to Cabinet. "
6. It is a fair comment, based upon our experience, that whilst our relationship has been a positive one in so many ways; the style of an incumbent Privacy Commissioner strongly influences the way in which regulations are made and enforced by the regulator. The powers are broad and the lack of a review about the 'correctness' of a decision leaves those regulated in a position where the current actual recourse may be inadequate.
7. It is our perception that the checks and balances and recourse which our business has in dealing with our regulator were designed over time (for very commendable reasons) but are not ideally suited for a merits based review of the regulations made.
8. It may seem emotive to say so but at times the impacts of regulations, made concerning credit reporters, operate as an additional tax on our business. Every free service or (as is currently proposed) - every price fixed service imposes a financial drag.

9. We appreciate that striking a balance is important where privacy and personal information are concerned. We believe that regulatory compliance is important too but there are times when the extent of this extra burden seems without adequate merit or out of balance.
10. In such instances we can hypothetically seek to refer the regulator to judicial review through the courts or refer the code amendment to be made to the Regulatory Review Committee but it is unlikely that any kind of merit based review will occur in an effective way if we do that. Making submissions in a public consultation on code review or amendment of the Code can be ineffectual too.
11. If successful the recourse to judicial review only antagonises the regulator and enables him to make the same decision again but following a more clearly defined path. We understand the careful analyses of the theoretical approaches. We would like to see the introduction of *effective merits based review* which was accessible; and could result in a correction.
12. The Code making power is broad and in practice the hypothetical checks do not operate, by testing the merits, in an economic sense, of what is proposed.
13. It is relevant that the Law Commission expressed a view on the kind of regulatory power in their review of the Privacy Act titled: 'Review of the Privacy Act 1993' an Issues Paper for stage 4 of the Law Commission's Review of Privacy Law. Chapter 7 addresses code making by the Commissioner and at page 182 remarks that :
The code-making provisions in the Privacy Act confer considerable power on the Privacy Commissioner. In constitutional law terms, section 46 of the Act is a "Henry VIII" clause as it confers delegated authority to amend an Act of Parliament. This sort of power should be granted by Parliament "rarely and with strict controls".
14. The Law Commission went on to criticise the controls on this power and advocate greater controls. They recommended: at page 186 -Q95- *We consider that codes of practice should be implemented by ordinary regulations approved by Cabinet, rather than simply being issued by the Privacy Commissioner. Do you agree?*
15. The government had yet to fully respond to the proposed Privacy Act law reforms and it is unclear when and to what extent actual reforms may take place.
16. In practice if one wishes to take issue with the regulator in the exercise of the Code making power then one has quite limited recourse which can be expensive, narrow and /or of very limited practical use.
17. We agree with: Wellington Electricity which submitted that:
Merits appeal processes are essential for ensuring robust regulatory outcomes. Regulators should be accountable for the decisions that are made and should be subject to the potential for third party appeal. (sub. 17, p. 1)
And with these other submitters which made a number of arguments in support of merits review:
The threshold for judicial review is high, and it does not provide an effective means of challenging decisions. (subs. 10, 29, 46, 48)
Access to merits review reduces the incentives for firms to lobby politicians or officials for special treatment or legislative change. (subs. 46)
Merits review would ensure regulators undertake a proper process (such as give sufficient consideration

to consultation). (subs. 5, 31, 46, 48)

18. We did not comment on the questions posed in a direct way.
19. Veda submits that an independent commission to regulate regulators in a consistent, coherent way and which is adequately directed and funded may be invaluable especially where some careful review of the correctness of a regulator's action is contemplated and made possible.
20. Veda submits that this would be a more useful approach if designed to speed up and facilitate effective real changes. This could enhance productivity where an independent agency with adequate funding and clear responsibility to hold the regulators to account is created. 'Making it happen' is about doing just that
21. We do believe that the time has come to address the issues raised by doing something about them which will not be dependent upon regulatory introspection or different views of the theory of administrative law. This is because more is required than the status quo.

Yours faithfully,


Michelle Chignell NZ Legal Counsel

