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Dear Steven

Regulatory Institutions and Practices – Issues Paper

Thank you for the opportunity to comment on the Commission's inquiry into regulatory institutions and practices. The design and operation of regulatory systems has significant implications for industry costs and productivity, and we support the Commission inquiry. This submission focuses primarily on the design and operation of economic regulation of providers in infrastructure markets. We would be open to discussing our more detailed views with the Commission at a later stage in the enquiry.

The inquiry is potentially broad ranging. To that end, if the Commission were able to articulate a clear statement on a regulatory philosophy for New Zealand it could help to set the tone for a consistent and effective regulatory framework.

The Commission has asked submitters to identify the institutional arrangements it should review and recommend guidelines to assist the design of regulatory regimes. We recommend that the Commission have a close look at economic regulation of the infrastructure sector as a priority initiative. This is an important area of the economy where a variety of regulatory instruments are applied. Substantively different institutional arrangements have been adopted across different infrastructure sectors that, on the face of it, share similar economic characteristics. Accordingly, the

sector raises specific regulatory issues and it would be worthwhile understanding the differing approaches and principles that could guide future decisions.

Further, we support the broad approach that you have taken to regulation and institutions in the discussion paper. A number of parties have roles and functions within a regulatory system – Ministers, independent regulators, providers and consumers – and regulatory instruments range from primary legislation through to direct Government participation in the market. Given the breadth of potential interventions, the Government can have multiple roles and interventions within the same sector. Accordingly, the Commission should also consider the additional regulatory design issues that arise when the Government is involved as a direct or indirect participant in the market.

The guidelines the Commission could consider include:

- The role of actors and stakeholders in regulatory decision making. For example, what regulatory decision making powers might be appropriate for Parliament or the Minister to hold? When might it be appropriate for Parliament or the Minister to pass responsibility for decisions to an independent specialist regulatory institution? The Commission discusses regulatory independence and institutional form in the discussion paper. The infrastructure sector is likely to make a useful case study of the role an independent regulator within the wider framework – i.e. what decisions it is expected to make and what form should independence take.

At this stage, regulation is applied inconsistently across infrastructure sectors. For example, the purpose of Part IV of the Commerce Act¹ is to “promote the long-term benefit of consumers in concentrated infrastructure markets by promoting outcomes that are consistent with outcomes produced in competitive markets...” whereas the purpose of section 18 of the Telecommunications Act (also administered by the Commerce Commission) is to “promote competition in telecommunications markets for the long-term benefit of end-users...” Further, Crown enterprises are subject to different oversight arrangements through, for example, the State Owned Enterprises and Crown Entities Acts. There may be good reason for differing approaches, however, it would be worthwhile understanding those differences and how policy makers might take account of those differences in regulatory design.

- Mechanisms for promoting consistency, predictability and transparency over when and how the Government might intervene in markets and how the regulator might act to achieve the desired policy outcomes. Again, different approaches are taken to when a regulatory intervention occurs and the nature of interventions. The Commission could survey differing approaches, and provide guidance on where policy makers might take differing approaches. The objective being to make the triggers and form of intervention more predictable for providers, investors and consumers.

Additional transparency is required where the Government both participates in and regulates a market to achieve regulatory outcomes. The Government is now a participant, investor and regulator of most infrastructure sectors in NZ. Different approaches have been adopted overseas to ensuring competitive neutrality between state and private sector businesses where the state participates in commerce, either as part-investor or primary commercial actor (supplier). This essentially recognises that the state has very different incentives to commercial operators and the

¹ Which deals with the regulation of electricity, gas, airports and is administered by the Commerce Commission.

states involvement in commerce can lead to unintended market distortions. Under these circumstances, the state may wish to pre-commit to limiting its activities as a market participant or providing additional transparency over those activities. For example, the Australian Government has implemented Competitive Neutrality policies to promote efficient competition between public and private businesses.² The Commission should consider providing guidance on how policy makers might best promote transparency when participating in markets to achieve policy objectives.

We also support the Commission considering the operation of regulatory systems. Initiatives that promote an effective system are likely to include:

- Transparent policy at the high level that enables parties to meet expectations and deliver desired policy outcomes;
- Monitoring and feedback loops that ensure the early wind back of regulation where not delivering intended objectives or no longer required. For example, economic regulation should enable the development of competition as soon as possible, and be structured in such a way that regulation can be progressively wound back as competitive outcomes are observed;
- A consistent mechanism to achieve clear, plain English, readily understood and accessible regulations that promote efficient outcomes. For example, consumers with full information will make the most rational buying decisions. Competitors in markets that are structured to achieve a level playing field will likely result in suppliers delivering services at the competitive level. Markets in which the rules are clear, simple, predictable and applied consistently and equally to all players are likely to result in investment decisions that are less biased by unpredictable intervention risks;
- Providing for a mechanism for effective and efficient review and appeals of regulatory decisions in the public interest.

Yours sincerely



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² See <http://www.pc.gov.au/agcnco/competitive-neutrality>