

8 May 2014



Productivity Commission
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By email: info@productivity.govt.nz

To whom it may concern,

Regulatory Institutions and Practices: Submission on the Draft Report

Thank you for the opportunity to provide a submission on the Commission's Draft Report on Regulatory Institutions and Practices (**Draft Report**).

Following ANZ Bank New Zealand Limited (**ANZ**)'s submission in October 2013 and participation in a case study workshop, ANZ continues to maintain a keen interest in the Commission's inquiry. As noted previously, ANZ believes it is in a unique position to respond to the Commission's inquiry as the largest financial institution in New Zealand. This means that we are well positioned to understand consumers and industry, and have direct experience operating under a wide range of New Zealand's laws and regulations.

ANZ welcomes and supports the Commission's work in preparing the Draft Report. It is clear the Commission has spent much time and resource investigating and understanding the issues, challenges and successes of New Zealand's various regulatory regimes today. In general, ANZ supports the findings and recommendations in the Draft Report. In particular, ANZ supports recommendations regarding:

- regulatory independence and institutional form;
- workforce capability;
- funding and accountability; and
- performance monitoring.

We would like to specifically draw your attention to the key messages set out below.

Key messages

- Demarcation between regulators' oversight could be strengthened through appropriate tools
- Merits reviews are a viable option to strengthen regulatory accountability

We have discussed each of these key messages in detail in Schedule 1 of this letter.

Our specific responses to the Commission's questions in the Draft Report are set out in Schedule 2 of this letter.

ANZ would also like to note it has received and reviewed a copy of the *Case Study: Regulation of the financial sector*, February 2014 and endorses the findings noted at paragraphs 99 and 100 of the case study.

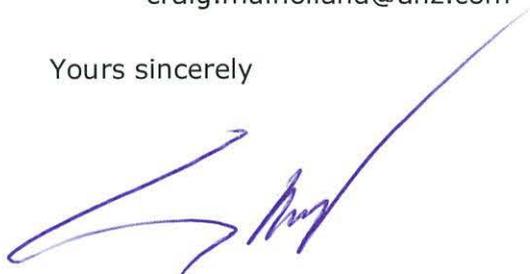
Contact for submission

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Yours sincerely



Craig Mulholland
General Counsel & Company Secretary

SCHEDULE 1 KEY MESSAGES

1 Demarcation between regulators' oversight could be strengthened through appropriate tools

Recommendation

Only where there is a compelling reason should two or more regulators have jurisdiction over a particular business activity. Significantly greater guidance should be provided to affected parties on where ultimate responsibility lies to provide affected industry participants with clarity (such as through mandating jurisdiction in legislation (in place of reliance on Memorandums of Understanding), shared guidance notes to the sector or council based regulator co-ordination). The aim should be to promote coordination, simplification and harmonisation across regulatory structures. The Commission should investigate and recommend tools that are used to achieve this.

As noted in our previous submission, ANZ believes it is important to ensure regulation is efficient by centralising regulatory functions and ensuring clear demarcation between different regulatory roles. This avoids ambiguity over regulatory thresholds or the identity of the responsible agency. Various tools are available to achieve this outcome including:

- Legislative reform that includes clear regulator mandates or provisions clarifying the demarcation of regulator's jurisdiction (eg the interplay between the Fair Trading Act and Financial Markets Conduct Act and the enforcement role of the Commerce Commission); and
- Regulator forums or councils to address multilateral co-ordination (eg the Council of Financial Regulators).

ANZ supports the Commission undertaking work to determine whether recommendations around appropriate tools being available and effectiveness of those tools are warranted. While these tools are currently employed in varying states, a more detailed analysis may identify areas for improvement. For example, ANZ refers to *Case Study: Regulation of the financial sector*, February 2014, which notes (p27):

"It was noted by some stakeholders that the Council of Financial Regulators (COFR) provides a useful forum for such coordination. However, it was noted that the COFR does not comprise all financial sector regulators ... Moreover, there is little transparency as to what the COFR does and therefore how effective it is in co-ordinating regulation across the sector. Some stakeholders therefore suggested that more visibility as to the activities of the COFR would be desirable and that its membership should be expanded to include all relevant financial sector regulators.

It was noted that there could be merit in Treasury being the chair of the COFR, with a view to promoting more effective engagement by Treasury in overseeing coordination

among the regulators and a more strategic and holistic approach to financial sector regulation"

2 Merits reviews are a viable option to strengthen regulatory accountability

Recommendation

ANZ considers that the Commission should devote greater time to investigating the importance of non-judicial review frameworks, such as merits reviews, that can provide consistency and meaningful accountability across New Zealand's regulatory regimes. Review processes should be flexible enough to provide meaningful accountability for the full range of a regulator's decision-making conduct.

The Commission's Findings 10.10 to 10.14 express the view that merits reviews are unwarranted in New Zealand due to the broad nature of judicial review. In ANZ's view, judicial review is limited in its scope as it only permits a court to review whether a regulator acted within its permissible powers and followed reasonable process in exercising its powers. The substance of the regulator's decision is not at question. Additionally, judicial review is often a lengthy and expensive process which limits its accessibility as a resolution option. Consequently by the time a decision is reached, the position that caused the judicial review often cannot be reversed or compensated. Investigation may show that merits review provides a more efficient and cost effective form of review.

On the other hand, merits reviews address issues of substance as well as process. Merits reviews therefore promote effective regulatory outcomes and accountability by removing the possibility of arbitrariness in regulatory decisions. The Australian Administrative Appeals Tribunal is empowered to merit review decisions made by regulators and ANZ recommends the Commission further investigate the Australian experience.

ANZ also refers to the key findings of *Case Study: Regulation of the financial sector*, February 2014, which notes (p32):

"Merits review: Consideration could be given to the options for strengthening the ability of regulated entities to seek independent review of regulator decisions. One option that would warrant consideration is the establishment of a merits review framework similar to the one in Australia".

Alternatively, the Commission could investigate either:

- Mediation services provided by an independent expert mutually agreed between the regulated entity and the regulator; or
- The establishment of an independent executive body accountable to a Minister that has an ombudsman-like function for review on appeal once all other avenues are exhausted,

as alternatives to merits review.

SCHEDULE 2
DRAFT REPORT QUESTIONS

Issues Paper Question	Submission
<p>Q3.1: Are there other or different elements of regulator design, practice or impact that should be reported on?</p>	<p>No</p>
<p>Q3.2: Are there factors that would make the benefits of reporting at a regime level, rather than an agency level, outweigh the costs of doing so?</p>	<p>No. ANZ supports reporting at an agency level. ANZ is regulated by multiple agencies and regimes due to its size and business activities and in ANZ's experience costs and issues caused by regime crossover is less problematic than agency crossover. For example, compliance duplication or burden stems from, in ANZ's experience, requests for information from more than one agency on the same thing (but with slightly different parameters) or from within the same agency. While regime cross-over is often catered for in legislation (eg provisions dealing with interaction with other enactments), jurisdictional cross over by agency has raised uncertainty and posed significant cost to businesses.</p>
<p>Q5.1: How can the role of the Regulations Review Committee be strengthened, if regulators are delegated greater regulation-making powers?</p>	<p>ANZ supports the powers of the Regulations Review Committee to be strengthened if regulators are delegated greater regulation-making powers. Whilst regulators will often have appropriate skill sets to advise on drafting laws, regulators are not experts in law making (rather, they are experts in enforcing the law) and they are not subject to full consultative processes that the parliamentary legislative process is. As such, powers a Regulations Review Committee could have include:</p> <ul style="list-style-type: none"> • power to take an action (eg disallow a regulation) after fit and proper process; • ability to review regulations off their own instigation or on application; • expanded grounds on which the Committee can draw the House's attention to regulations (for example, proper consultation process not being followed)

Issues Paper Question	Submission
<p>Q7.1: What factors are contributing to poor communication within regulatory bodies? Are these factors cultural or procedural in nature? What actions or approaches could be put in place to reduce barriers to internal communication?</p>	<p>In ANZ's experience, poor communication can arise where the body responsible for regulatory activities also has a formal role which is not regulatory in nature. For example, a regulator may, in addition to its regulatory function, have a commercial purpose. This two-fold focus can lead to the regulator not having a cogent communication strategy (internally and externally), and inconsistent approaches to particular situations (for example, where a particular situation leads to a conflict between the two areas of focus for the body). This can ultimately cause the regulator to make decisions which do not appear consistent, and may be sub-optimal.</p> <p>ANZ suggests that, where a regulator has a two-fold function, a separate but independent unit performs the regulatory function. This will assist to alleviate any potential for conflicts of interest or purpose to arise within that body. A good example of this type of model can be seen in exchange operators, who have both a commercial function and a regulatory function. It is often the case that the regulatory function of exchanges will reside in separate, independent legal vehicle, with its own management reporting directly into the Board of the ultimate holding company.</p> <p>ANZ also suggests that poor communication is more likely to be cultural than procedural. In ANZ's internal experience, a cultural shift to transparency through cross sharing information and experiences has resulted in the breaking down of silos within the organisation. ANZ achieved this by creating formal regular forums with representatives from relevant business areas. These provide the opportunity to share information and raise and resolve issues across the entire business rather than in isolation.</p>
<p>Q8.1: Are there any examples of legislative rigidity that may prevent regulators from using participatory processes and/or making decisions that would benefit both consumers and regulated parties? What evidence is there of this? What lessons could be learnt from these examples?</p>	<p>Not that ANZ is aware of</p>

Issues Paper Question	Submission
<p>Q8.2: Are there examples of consultation provisions that are working well, or alternatively, not as well as they should? What factors contribute to consultation provisions working well/poorly?</p>	<p>The consultation process followed by the Ministry of Business, Innovation and Employment in recent times has worked well – that is, release of an exposure draft for comment ahead of the formal consultation process. This has allowed major issues to be identified, discussed and resolved early in the process, which has facilitated a smoother passage of the legislation once released to the formal consultation process. The Financial Markets Authority have also followed a similar model by releasing guidance for comment (often more than once) prior to final publication.</p> <p>In general, key aspects of a consultation process operating effectively are:</p> <ul style="list-style-type: none"> • robust articulation of the rationale for change, such as a thorough Regulatory Impact Statement; • appropriate time allowed to prepare a submission given size and complexity of changes; • confidence to be able to raise issues without fear of retribution (for regulator consultation); • appropriate rights of reply/number of consultation rounds; • clearly articulated summary of submissions and responses (that is reasons for acceptance or rejection) by consulting party. <p>In ANZ’s experience, small closed consultation with industry has also been effective to receive the benefit of the experience, working knowledge and expertise of key industry players, allow free and frank discussion and to drill into the detail and operational feasibility or effects of the proposed changes.</p>
<p>Q9.1: Would an overarching Treaty clause in an appropriate statute (separate from the jurisdiction the Treaty of Waitangi Act 1975 confers on the Waitangi Tribunal to investigate actions inconsistent with Treaty principles), that signals the Crown’s intent with respect to the principles of the Treaty of Waitangi, improve the operation of regulatory regimes in New Zealand?</p>	<p>ANZ has no submission on this question</p>
<p>Q10.1: What evidence exists for the effectiveness of internal review of regulatory decisions?</p>	<p>ANZ has no submission on this question</p>

Issues Paper Question	Submission
<p>Q10.2: How effective are the Legislation Advisory Committee's guidelines on appeal and review in influencing policy-makers in the design of new regulatory regimes?</p>	<p>ANZ has no submission on this question</p>
<p>Q10.3: Is there a need for greater specialisation among the judiciary to hear cases relating to complex areas of regulation? What approaches might be effective to develop greater expertise among the judiciary in these areas?</p>	<p>ANZ has no submission on this question</p>
<p>Q10.4: What benefits and risks are there in providing for alternative dispute resolution mechanisms as a way of reviewing regulatory decisions?</p>	<p>ANZ supports the use of alternative dispute resolution mechanisms, particularly merits review, as a way of reviewing regulatory decisions. ANZ views the benefits and risks as follows:</p> <p>Potential Benefits:</p> <ul style="list-style-type: none"> • special forum more fit for purpose • less costly • more conciliatory which may result in less damage to the relationship between the regulator and the participant <p>Potential Risks:</p> <ul style="list-style-type: none"> • weight of evidence may be different because the mechanism does not apply formal standards as a Court would • may not set precedent for similar issues which may result in inconsistency of application and resolutions within the industry or regime being regulated

Issues Paper Question	Submission
<p>Q10.5: Do recent developments in the theoretical literature, suggesting that in designing and implementing regulatory regimes, there needs to be a focus on:</p> <ul style="list-style-type: none"> - the behaviour, attitudes and cultures of regulatory actors, including those of the regulator; - the dynamics of the regulated environment in which regulated parties and regulator operate, and the institutional setting of the regulatory regime; - the logics of the regulatory tools and strategies used; - the performance of the regime over time, and - changes in each of the above factors; <p>offer a way forward for improving both the design and operation of New Zealand's regulatory regimes?</p>	<p>ANZ has no submission on this question</p>

Issues Paper Question	Submission
<p>Q13.1: Are there clear and legally accepted definitions of fees and levies in New Zealand? If not, does this matter? Are there issues that are specific to either fees or levies that the Commission needs to consider?</p>	<p>ANZ is not aware of clear and legally accepted definitions of fees and levies in New Zealand. ANZ does not believe formal definitions are required; however a formal and consistent method for the setting of fees and levies is imperative. ANZ supports Recommendation 13.1</p> <p>ANZ believes that the setting of fees and levies must be conducted according to an established and documented framework. This is particularly important where the regulator is empowered directly with the fee-setting ability in the absence of a third party reviewer. In particular, a fee /levy setting framework requires the following fundamental tenants:</p> <ul style="list-style-type: none"> • requirement to consult with entities subject to the fee/levy; • determination of the upper limit of the fee/levy so that charges are not in excess of the estimated full costs; • appropriate analysis of the basis for fee/levy setting and justification for the requirement to charge (eg Regulatory Impact Statement); • embedded review mechanisms to ensure relevancy and necessity of fee/levy is checked in future <p>The cost recovery basis for fee and levy setting should also take into account the size and number of participants that are affected to ensure that the application of fees is spread appropriately throughout the participants in the relevant industry. This includes an allocation that is not unduly weighted towards larger participants (so that if a participant withdraws the total fee recovery pool is not) and also appropriately reflects the risks posed by the participants in terms of the requisite level of regulatory oversight.</p> <p>ANZ refers the Commission to Canada’s Office of the Comptroller General’s <i>“Guide to Establishing the Level of a Cost-based User Fee or Regulatory Charge”</i> which sets clear parameters for requirements that must be considered and assessed when regulators are setting fees or charges in Canada http://tbs-sct.gc.ca/fm-gf/ktopics-dossiersc/fms-sgf/costing-couts/cost-couts-eng.asp .</p>
<p>Q13.2: Would there be net benefits from imposing a general obligation on regulatory agencies to consult before fees or levies are introduced or amended?</p>	<p>Yes. ANZ recommends that regulatory agencies should always consult before fees or levies are introduced or amended.</p>

Issues Paper Question	Submission
<p>Q13.3: Do surpluses and deficits on memorandum accounts signify a problem? If so, are there worthwhile options to address the problem?</p>	<p>If there is no scheduled review process in relation to the accounts, a surplus or deficit may indicate that a periodic review is required or should be built into the existing process.</p>
<p>Q14.1: Are there other questions or characteristics that a monitoring approach for Crown entity regulators should include?</p>	<p>ANZ makes no submission on this question.</p>

Issues Paper Question	Submission
<p>Q15.1: What would be the advantages and disadvantages of increasing the role of Parliament in scrutinising how the stock of regulation is managed? If Parliament's role should increase, what approach should be used to achieve it?</p>	<p>The advantages and disadvantages of increasing Parliament's role in scrutinising the stock of regulation are as follows:</p> <p>Advantages:</p> <ul style="list-style-type: none"> • more accountability for the promulgation of and life of regulation leading to more effective and meaningful regulation • health of regulation on an ongoing basis is actively reviewed to ensure it remains relevant • more attention is paid to creation of regulation so that knee-jerk regulation that has unintended consequences is avoided <p>Disadvantages:</p> <ul style="list-style-type: none"> • additional bureaucratic layer in regulatory-making process adds time and cost to the process • potential for greater 'politicisation' of regulation, which may lead to good short term outcomes for particular political interests, but not provide good long term outcomes for the area being regulated <p>ANZ recommends that a small executive body with its own Minister, similar to the Australian Office of Best Practice Regulation, could perform this role. This body would have several functions including:</p> <ul style="list-style-type: none"> • formal jurisdiction to review all Regulatory Impact Statements and cost/benefit analyses and approve or not approve the Statements, essentially acting as gatekeeper to new regulations. Their powers would include referring proposed regulations back to the relevant Minister on the basis that the body was not satisfied all required assessments had been made and the power to recommend their minister take proposals to cabinet to refer back regulations to be reviewed, repeat consultation or otherwise revoke. • ombudsman-like role with ability to lodge appeal for parties to raise grievances with regulations where other channels were exhausted. This is a possible alternative to merits review.
<p>Q16.1: Are there other functions for which a minister responsible for regulatory management would need support?</p>	<p>ANZ makes no submission on this question.</p>
<p>Q16.2: Which is the best location for a support agency for a minister with responsibility for the regulatory management system?</p>	<p>ANZ makes no submission on this question.</p>