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NZ Productivity Commission: Regulatory Institutions and Practices Inquiry.

Thank you for the opportunity to comment on the above discussion document.

Carter Holt Harvey is a wood and paper products manufacturer with operations in New Zealand and the eastern states of Australia. We are a substantial employer, exporter and energy user, as well as generating a significant domestic demand for logs and fibre. Our operations and profitability is influenced by the efficacy of New Zealand's regulatory institutions.

CHH manufactures and sells commodities on international markets and to other NZ manufacturers whose products are exported. We have limited opportunity to recover cost increases imposed through regulation, particularly in the short term. Our and our customers exposure to global pricing makes the cost increases associated with even well intentioned regulatory intervention problematic.

CHH incurs considerable cost responding to regulatory changes, including providing comment and submissions on the large number of regulations affecting our business. We do not consider adequate weighting is given to the negative implications of regulation by the proponents of regulation, include the cost of participation in processes of regulatory development, a current example being the 2 year / 2-3 days a month expectation for participation in WRC's collaborative water management process. We accept that the comments of those highlighting concerns with proposed regulation represent a 'vested interest' including the 'vested interest' in maintaining a profitable enterprise and employment. Equal attention needs to be given to the potentially significant vested interest those promulgating regulation have in seeing it adopted. Officials involved in regulating greenhouse gas emissions or landfill waste can have as great a vested interest in maintaining or expanding their roles and responsibility as those incurring a cost as a result of the regulation.

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The large number of bodies with regulatory powers is a concern if the result was devolution of regulatory powers to agencies lacking the scale needed to obtain expertise appropriate to the regulatory function being performed. Is it logical or efficient that technically demanding regulation of GMO's or chemical use such as fluoride by expert groups at central government level are revisited at local government level?

The adequacy of safeguards needs to be assured where regulatory powers are wielded by Requiring Authorities, CCO's and similar organisations with both regulatory and commercial interest.

Scope of Inquiry
We recommend that the Commission looks at regulatory powers exercised by Local Government and quasi-Governmental organisations, as well as regulation managed by Central Government. A substantial amount of costly regulation is promulgated and administered locally.

The Resource Management Act creates a mandate for broad interpretation of "sustainable management" of the environment by Regional and District Government. Our experience over the last 20 years has been that:

- 'Sustainable management' of forestry operations has been interpreted differently by different regulators sufficiently often to justify greater national direction.

- Devolution of regulatory powers to local government multiplies the costs of involvement in regulatory development by the number of Councils involved. A concerted effort to standardise the regulation applying to one activity (forestry) using NES powers already in the RMA has been rejected on the grounds of regional differences, notwithstanding the similarity of the activity being regulated. It could be worth investigating whether those in Regional Government opposed to a forestry NES have a vested interest in retaining a mandate to regulate, perhaps on a cost recovered basis.

- Electricity distribution companies have exercised their rights to seek favourable changes to local government plans, notwithstanding their powers as a Requiring Authority under the Public Works Act. A Requiring Authority could find the RMA process attractive if an outcome was to avoid any claims for recompense that could arise following the Public Works Act process.

The Waste Minimisation Act (WMA) represents central government intervention via a devolved and subjective obligation on Local Government. The Act creates a mandate for the regulation of 'solid waste' by way of local authority Waste Management and Minimisation Plans. Participation in WMMP's development by those affected is not obligatory but can be critical to a business depending on the scope of controls and regulations proposed. Participation can require submissions on any overarching strategic plan which may create the mandate and objectives for the WMMP. Both the strategic plan and the WMMP can be prepared in both draft and then proposed form, the expectation of regulators being that submissions are made on both. Submissions and appeals on bylaws can be required from

those affected if subsequent rights of appeal/judicial review are to be retained. Costs of affected parties' participation in WMA-inspired regulatory processes are carried by those who choose to exercise their right to be involved.

It is not clear from the Discussion Document exactly what aspects of regulation making processes are in scope. Our view is that "the process by which (regulation) is developed and passed into law" is as relevant as "the features that shape regulation to succeed". In view of the latter aspect being in scope we suggest a specific examination is made of the determination of 'success' in regulations. In particular we suggest clear definitions are established by the Productivity Commission as to:

- "Public interest", "public good" and "market failure" sufficient to justify regulation.
- "Monopoly or anti-competitive behaviour", by a 'market participant' with direct or indirect access to regulation making powers.
- Methods used to determine the potential for "externalities" of sufficient moment to justify regulation. For example, is the propensity of individuals to litter and alleged difficulties and costs to Councils in enforcing the Litter Act sufficient justification for the regulation of the packaging industry, on the basis that packaging is part of the litter stream?
- "Fairness" and "individual liberty".

In the absence of clear definitions of subjective terms such as 'public good' and 'fairness' there is little or no benchmark against which the worth of regulation can be assessed. The absence of a clear and agreed definition of these outcomes makes it difficult to examine the claims of those promoting regulation that their proposals are indeed worthwhile and cost effective.

Devolution of regulatory powers would appear to increase the risk of regulatory proposals being developed in isolation of all other costs and benefits. Central Government regulating for 'waste minimisation' as defined and applied at the local level by Council officers employed in the waste management unit imposes costs and constraints on individuals and the community which are not readily apparent to those liable to pay. Devolution of regulatory powers reduces the ability of regulated parties to scrutinise the trade-offs associated with regulation and therefore the balance of private cost and public benefit.

Question 1: Scope of Review

We recommend consideration of as broad a range of regulatory practices as practicable. In particular, we suggest examination is made of the basis for and extent to which regulatory powers are devolved to (i) local government and (ii) agencies that have both regulatory powers and commercial objectives, such as Requiring Authorities and Local Authority Council Controlled Organisations.

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We are concerned that devolution of regulatory powers has the effect of limiting the capacity of interested and affected parties to contribute to regulatory development. Media and independent scrutiny of local government's regulatory decisions could be less because each individual instance of regulation may not be considered significant. Collectively such regulations could amount to a significant impost.

Commercial incentives could inappropriately influence regulatory development where commercial and regulatory powers exist in the same organisation. Organisations involved in energy supply along monopoly infrastructure can also have a commercial interest in the sale of energy services which could influence their exercise of regulatory powers. An example noted above is the option available to electricity distribution companies to establish rights across private land by way of changes to District Plans or through negotiation and compensation as provided for under the Public Works Act. CCO's such as Watercare in Auckland are an example of the involvement of an organisation in bylaw development which also has a direct financial interest in the outcome and perhaps, an expectation that bylaws could substitute for or improve the outcomes of subsequent commercial negotiation of water and waste water supply agreements.

We encourage the Productivity Commission to examine in detail the potentially perverse incentives created where monopoly service providers and those with a commercial/financial interest in the outcome, are involved in developing and promulgating regulation.

Question 2: Guidelines

Guidelines that established a clear presumption in favour of public visibility and accountability for all those exercising regulatory powers would be useful.

Guidelines that encouraged retention of regulatory powers at the highest level of authority practicable in the circumstances would enhance visibility and scrutiny.

An obligation to fully disclose the basis for a decision to regulate, including related legal advice, should be an established guideline where coercive regulatory power is exercised 'in the public interest.' Full disclosure will enhance accountability if it increases awareness and risk of independent judicial review.

Questions 3 and 4: NZ-style Regulation

Whether NZ has a unique "regulatory style" as a result of geography, history or population size is likely a matter of opinion. We consider the most appropriate regulatory style for NZ is one reflective of NZ's current situation as an open, export-dependent trading nation.

Europe, the United States and Australia have all recently introduced laws regulating the importation of illegally harvested wood products (including paper and paper packaging) to their countries. Proof of legality of harvest and by implication compliance with a multitude of local authority rules and regulations is increasingly a requirement for continued trade access. While there is little doubt that NZ wood and paper products meet the expectations of legality of importing countries, the cost of demonstrating legal compliance to the satisfaction of overseas regulators could be problematic given the devolved nature of regulatory powers under the RMA, including the opposition from NZ regulators to a National Environmental Standard (NES) for forestry under the RMA.

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CHH would be concerned if the Commission gave undue weight to past regulation in determining that regulation should continue. Forestry was frequently a regulated land use under the Town and Country Planning Act. A more permissive attitude was taken toward the alternative (and competing) land use of pastoral agriculture under that Act. The same general approach has continued since the introduction of the RMA in 1991 despite the premise of the RMA being regulation in proportion to the avoidance, remedy or mitigation of adverse effects. Whether current levels of regulation of forestry are based on preconceived ideas or some other incentive is likely a matter of opinion. It has to be accepted that the incentives to regulate are not limited to the overt protection of the public interest.

Question 5: Categories

The Regulatory Landscape section of the discussion document comments at page 10 on the need for regulation (licensing) of building practitioners as a response to problems of leaky buildings "....in the absence of other mechanisms (such as large established building firms seeking to protect their brand)....". It is not stated whether the Commissions enquiry into leaky building considered the role that regulation may have played in exacerbating the problem and or whether the regulation of building practitioners could lead to reduced scrutiny of a builders individual actions.

We suggest the Productivity Commission review the potential for perverse incentives to be created by regulation. For example, what would happen if much of New Zealand's housing stock was built without intervention in the form of building inspections? It could be speculated that a building owner became more motivated to ensure building standards and designs were maintained in the absence of a formal inspection (for which the building owner is compelled to pay). The intervention and assurances provided by a regulated/compulsory appointed inspection could be used to negate the involvement of the building owner, in the event that he or she was to criticise the standard of construction. A logical conclusion of compulsory regulation is that a building owner is entitled to act on the assumption that use of a **licensed** building practitioner means responsibility for ensuring the quality of the work is the responsibility of the regulating body. Regulation removes control.

CHH is concerned at the potential for regulation to control investors' decisions, choices and costs in pursuit of subjective and at times unclear and uncertain outcomes. The proposal by Auckland Council to require 'green star' rating of building projects, whereby the acceptable 'environmental impact' of a building is predetermined and prescribed by a contracted 'expert'. The effect of this proposed intervention will be to require the use of a commercially motivated 'service provider' who will prescribe various 'green' elements. The assumption by Auckland Council appears to be that desirable 'green' elements will not be adopted by a building owner on a voluntary basis. Parties have raised concerns with this proposal for reasons including:

- The potential for prescribed use of a commercially motivated 'green certification' service provider, the 'Green Building Council' (GBC).
- Uncertainty as to the environmental outcomes being sought, recognising that aspects of the GBC prescription is currently under review, covers a multitude of aspects of building, and the particular circumstances of any building project (such as locality and

intended use of the building) all influence the optimum configuration for environmental and other outcomes.

- The unavoidable cost of obtaining 'green star' and all other regulated approvals at the planning stage of a building, potentially resulting in a corresponding reduction in funds available to capitalise environmental and or other features.
- The inference from use of regulation that prescribed expenditure on environmental improvements cannot be an efficient use of available capital. Assurances that prescribed 'green buildings' are cost effective are undermined in a perceptual sense at least by their imposition using regulation. Logic suggests that those aspects of 'green building' yielding a favourable ROI will be adopted by financially prudent investors without recourse to compulsion.
- A prescribed form of 'green building' could impede innovation and environmental improvement if the cost and time to the individual in seeking a dispensation from the prescribed form exceeds the expected benefits.

The Commission could usefully determine that New Zealand's regulatory regimes should be analysed on a rigorous cost/benefit basis, with greater regard given to the perverse and unintended outcomes that can arise as well as the obvious and predicted benefits.

Question 6: Uncertain Objectives

CHH supports the Discussion Document's recognition that the purpose of regulation should be clearly articulated and boundaries of regulators authority clear to both the regulators and the regulated.

There are numerous examples where the precise interpretation of a regulation is unclear or a matter left to the regulators' discretion.

Visual and landscape rules enforced under the RMA are an example where beauty is in the eye of the regulator. Forestry operators can be required to maintain visual buffers of harvesting operations not required of those harvesting hay or another crop, with no obvious reason for the different approach. The Electricity Act "Hazards from Trees" regulations specifies that trees and other interferences are kept a specified distance from power lines, notwithstanding that the lines themselves are not static and are therefore capable of occupying a greater or lesser area than the prescribed "hazard zone". Determination of hazard zone depends on factors such as wind conditions, ambient temperature and heating of the wire in response to electrical load.

In both the above examples interpretation of the regulation by the "regulator" seems to carry greater weight, notwithstanding the fact that it is the "regulated" that incurs the costs of the interpretation.

Seemingly certain regulation such as workplace exposure standards can be problematic, with the determination of compliance (or not) often dependent on the sampling strategy employed or unrelated environmental influences. There is a clear and understandable obligation on employers to provide a safe workplace. Determination of what constitutes a

safe workplace can place considerable cost on an employer if it involves the contracted advice and assistance of specialist and therefore costly expertise.

Clear and fair regulation makes an important contribution to society, investment and the economy. Equally, at a certain level of cost it becomes cost effective to source products from jurisdictions with lower standards and therefore costs of operation.

A common theme in the above examples is uncertainty of interpretation of the regulation. A useful finding by the Productivity Commission could be that matters of sufficient importance to justify coercive regulation also justify the effort and cost required to make them explicit. Regulatory proposals should be able to be challenged on the sole basis that they are unclear and unreasonably subjective. Regulatory decisions should be reviewable by the Courts on the same grounds. The expectation must be that all those exercising coercive powers and those liable to adhere to them are clear in their objectives and interventions.

Question 7: Multiple Objectives

The Commissions interest in regulation with multiple objectives could usefully be expanded to a consideration of the application of regulation in complex settings. We suggest that in the majority of settings there will be a number of regulatory and other factors to consider. Using the Electricity Act regulation cited above, the land owner seeking compliance with a Hazardous Trees notice will also have to be aware of their obligation to provide a safe workplace for those clearing the lines. They might have to have regard to the adverse visual impact that tree clearing might have. They will need to undertake the works in a manner compliant with the Historic Places Act if in proximity to valued features or sites and have regard to any liability under the Climate Change Response Act. They will need to avoid disturbance to riparian or other valued environmental features and work in a manner that does not disrupt traffic or damage the road surface. They will logically be motivated to undertake the works in a cost effective and profitable manner.

CHH suggests that the obligation to consider multiple objectives should be extended, more than at present, to those promulgating regulation. We have previously sought clarification from the Ministry for the Environment as to the priority afforded the Commerce Act in seeking to give effect to the presumption in the Waste Minimisation Act, that manufacturers demonstrate "Extended Producer Responsibility" (EPR). One interpretation of EPR is that it includes an obligation to discuss with manufacturers of similar products the possible means and arrangements whereby those products can be recovered and or recycled. It is conceivable that concerted efforts to give effect to the statutory/regulatory expectation for EPR could be misconstrued as an unintended or deliberate breach of laws intended to prevent cartel or collusive behaviour. Our concerns in this regard have been raised with a range of regulatory bodies including the Select Committee considering submissions on the Waste Minimisation Bill. The range of responses received has motivated a 'precautionary approach' with respect to the WMA and in favour of commerce related legislation.

We suggest that the Commission recommend an obligation on those exercising regulators to identify and resolve conflicts between statutes before regulation is promulgated. The presumption should be that those being regulated and therefore at risk of penalty in the event of non-compliance have an expectation that overlapping obligations are clear or at

least prioritised. Such clarity would be consistent with concepts of fairness and justice promulgated in the Bill of Rights Act and at the beginning of the discussion document. Interpretation of any uncertainty in favour of the 'regulated' would serve to incentivise those promulgating regulation to be clear as to their objectives. It will hopefully maintain the accountability of both politicians and the public service in exercising coercive powers.

Question 9: Industry Promotion

Working from the assumption that economic activity and consequential social / employment benefits are desirable, it can be extrapolated that most regulators are both 'promoters' of economic activity and regulators. Auckland Council has specific objectives and staff dedicated to the task of increasing economic activity in Auckland, albeit in specified directions. MPI support and promote primary industries like forestry while at the same time supporting their regulation and or the imposition of regulatory cost. Such conflicts can be managed by separating the different functions within regulatory organisations. Separation of functions is understandable but presumably makes it difficult to achieve other requirements of regulation including a balancing of objectives. Regulators should not consider themselves unable to factor in all relevant issues including objectives and policies promulgated by other parts of their own organisation.

Questions 10 and 11: Policy Functions Not Well Defined

Conflicts arising from the different policy interests of regulators are probably inevitable given the broad range of actually and potentially contradictory objectives of Government. For example, the Department of Conservation is a statutory advocate for conservation whereas the Ministry of Primary Industry directly and indirectly supports farming interests. As already discussed, there is an apparent conflict between the expectations of the Waste Minimisation Act and consumer protection legislation. Government's stated concern at the cost of construction does not appear to have influenced regulatory-related costs of building including the proposed mandatory imposition of "Green Star" rating of buildings by Auckland Council.

We are unclear whether the Commission will comment on the individual actual and apparent conflicts in regulation at all tiers of Government. As noted above, it could usefully reach the generic conclusion that use of coercive regulation must be tempered by an obligation on the regulator to identify and resolve all regulatory conflicts before regulation is imposed. The Commission should find it unreasonable and therefore unacceptable that a regulated party be subject to conflicting and contradictory obligations. As an alternative, the Commission could recommend that evidence of regulatory conflicts be accepted as a reasonable basis for exemption from one or more regulatory obligations.

Questions 14 – 19: Regulator Independence

CHH supports those aspects of the Discussion Document which highlight the value of regulatory independence, particularly where the determination of compliance with regulation is a matter of subjective judgement. Regulation requiring value judgments should be retained at the highest reasonable 'political' level rather than devolved, to encourage accountability for subjective interpretation. Where matters of detail require regulation and administration at less accountable levels of government, the degree of discretion available should be clearly circumscribed.

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Question 20: Institutional Forms
Standards New Zealand is in many respects a regulatory body. Its statutory function is to set and maintain standards which are largely a matter of public interest. It can be considered an objective regulating body where it sets standards independent of any other interest.

The current obligation on Standards New Zealand is to identify a beneficiary of its standards development work and from whom to recover the costs of its work. The resulting Standard is publically available.

An implication of Standards NZ arrangement is that of 'free rider' risk. Where more than one party benefits from a Standard there may be a reluctance to incur the cost of standards development by any one party. Where Standards have one obvious beneficiary the risk is that the single or limited parties involved in standards development could have an influence at variance with the public interest.

CHH recommend the Commission highlight the merit of Standards New Zealand operating as a fully funded public service.

Question 21 and Questions 26 – 28: Institutional Form
Preparing effective regulation requires a comprehensive knowledge of the area being regulated. Effective regulation requires specialist expertise and/or the ability to identify and contract that expertise.

Regulatory bodies should be independent of but not blind to the wider policy and economic context in which their regulation operates. Therefore institutional form includes the ability to identify and manage the potential conflicts between specialist expertise and impartial independence.

We suggest there should be a requirement for full disclosure of the information used to scope and justify regulation on the same basis as the OIA that public information is public unless there is a good reason for it not to be. Disclosure should extend to a waiver of legal confidentiality that might apply in normal commercial situations. The knowledge that the justification for regulation is available for public scrutiny could be the most cost effective means of ensuring consistent and efficient regulation.

Where coercive powers are justified in the public interest it is reasonable for those powers to be justified in full. The right of those affected by regulation to appeal decisions to an independent authority should be identified by the Commission as a reasonable presumption. A presumption that the justification for a regulation will be tested by an independent body will help ensure regulatory powers are exercised appropriately.

Auckland Council has chosen to regulate the waste industry by way of bylaw. The Council has chosen to determine and constrain by regulation many aspects of what is normally a matter of commercial and private interest, including days of operation, the choices made with respect to end use of materials and the shape and size of receptacles. Whether the bylaw is reasonable in all respects and or could have been achieved by way of normal

commercial contract and negotiation is a matter of opinion. To the extent that one or more affected parties consider themselves adversely affected, it is not unreasonable that the use of coercive powers be subject to independent scrutiny.

Question 29: Regulatory Risk and Responsibility
The Discussion paper comments on the risk incurred by regulatory authorities in deciding to regulate; for example in undertaking to determine a house to be code compliant. Presumably such risk is within the control of the regulator, it being a matter of regulator discretion whether and how to regulate?

The Commission could usefully address the potentially unmanageable risk imposed on the regulated party and the end-recipient (where different) as a result of regulatory intervention. The determination and decisions of a regulatory authority to regulate should absolve the 'regulated' from responsibility in the event that the regulatory decision was made in error because:

- The decision of the regulatory body will likely be used to curtail an dispute, for example between a builder and a building owner, and;
- The regulated parties' insurer and numerous other parties are entitled to make determinations of cost and risk based on the assumption the regulator is competent and diligent.

The Commission could usefully indicate that a decision to regulate is a deliberate decision to reallocate the onus of responsibility, whether the regulation is a matter of workplace safety, earthquake preparedness or the code compliance of a building. Powers of regulation are usefully constrained by the knowledge that exercising powers of regulation is also an assumption of responsibility for the outcomes of regulation. A duty of care and liability where due care is not exercised is reasonable in such situations. Does a regulatory decision as to the size and shape of a waste bin make the regulator culpable in the event of injury arising from the use of that bin?

Questions 30 and 33: Funding
CHH supports the statement in the Discussion Document "How regulators are funded can impact the incentives they face. To promote objectivity and independence, regulators should be clear about who pays for regulatory services, how much and why (The Treasury, 2002). This information should be published in a transparent way that.....promotes accountability.....".

The Waste Minimisation Act mandates the imposition of a tax on solid waste disposed of to landfill. Our understanding is that the solid waste tax generates in excess of $20 million a year, hypothecated for use in furthering the objectives of the Act. Half the fund generated is allocated to local councils on a non-contestable basis to fund 'waste minimising' activities. It is not clear that an income guaranteed by regulation (the WMA) and expended on an uncontested basis gives rise to the level of objectivity and independence identified by Treasury as necessary to promote accountability.

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Question 37: Combining Regulatory Powers
The size of NZ's population, the similarity of many regulated activities (e.g. building, farming, roading, etc) and the limited availability of specialist expertise justify greater aggregation of regulatory powers, particularly where regulation involves a greater degree of discretion and expert judgement.

Questions 45 and 46: Consultation
Our presumption is that the purpose of consultation in regulatory development is to ensure workable and cost effective regulation. Participating in consultation on regulatory proposals is a costly undertaking. The cost and time involved in consultation curtails input from many of those without a direct and over-riding interest, including people with independent expert or other valuable input.

Consultation can be more costly and therefore more difficult to justify at the local as compared to the central government level. The limited coverage, the need to repeatedly cover many of the same arguments in different parts of the country and the more limited access of regulators to expertise needed to accurately judge the feedback received can result in disproportionate costs of participation in regulatory development at the local level.

Question 47: Advisory Boards
Expert Advisory Boards making technically challenging decisions would seem efficient where the technical / expert input is applied once in the development of an acceptable regulatory prescription. EPA's decisions on GMO releases or controls on the use of a particular pesticide and water fluoridation are examples of decisions that are usefully litigated only once.

Questions 50-53: Regulators Managing Risk
The significant differences observed between regions in the regulation and management of many of the same issues under the RMA suggests some way to go to achieve a 'culture towards learning and peer review'. The decisions of some local authorities to regulate matters that have already been determined nationally in an entirely different way (e.g. GMO's and the fluoridation of drinking water) would appear contrary to the Productivity Commissions 2013 finding that learning and peer review occurs, notwithstanding such learning being 'critical to the quality and consistency of decisions'.

Administration of the RMA provides a number of examples where it can be speculated that political risk rather than scientific / technical considerations have had an influence, acknowledging that the subjective and variable objectives of that Act may mean a political decision is in fact correct. The Waikato Regional Councils "Variation 5" validating existing non-point source agricultural discharges contrasts with Horizons' Regional Council "One Plan". The latter approach to non-point source agricultural pollution has faced a concerted challenge.

An inference that can be drawn from different regulatory decisions on the same issue is that differences in political and community pressure apply throughout the country. The Productivity Commission could usefully explore mechanisms for the development of regulation that rewarded the 'correct' decision. A perception is that the current system of regulation 'rewards' decisions on the basis of the strength of the constituency favouring that

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outcome. A regulator deciding against something that may be technically correct or nationally economically advantageous is rewarded to the extent that the numbers of vocal opponents frequently exceed the number of vocal proponents.

The opportunity for greater scrutiny of a regulators decision may be a useful way of creating a culture of robust and evidence-based decision making. An expectation and measure of an efficient regulatory system should be that challenging decisions made by the regulator are not successfully appealed even where that opportunity exists.

Question 54: Professionalism
We support the OECD's principles for the governance of regulators and in particular:

- The expectations for each regulator should be clearly outlined....
- Regulated entities should have the right of appeal of decisions that have a significant impact....preferably through a judicial process."
- The opportunity for independent review of significant regulatory decisions should be available in the absence of strong (emphasis added) public policy reasons to the contrary.

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