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Mr Steven Bailey
Inquiry Director
New Zealand Productivity Commission

By email: Steven.Bailey@Productivity.govt.nz

12 May 2014

Dear Mr Bailey

Regulatory Institutions and Practices: Draft Report - Ministry of Justice comments

1. The Ministry of Justice welcomes the opportunity to comment on the Productivity Commission's *Regulatory Institutions and Practices: Draft Report (*March 2014*).*

2. The report correctly identifies the importance of regulation to New Zealanders' lives and identifies a range of issues that need to be considered in order to improve regulatory design and practice. In particular we welcome the report's emphasis on the principles of certainty, predictability, transparency and accountability in decision-making. These principles are core to the rule of law and are fundamental to a prosperous, safe and just society.

3. As a general point, we wonder if the Commission might wish to consider further whether there are viable alternatives to its preferred options and whether the report clearly draws out relative priorities and interdependencies between recommendations. Departments will need to consider these questions in advising the Government on its response to the report, once finalised. Drawing out these points in the report would be of great assistance in that process.

4. Given the length of the report and our broad comfort that the Commission is giving due weight to fundamental constitutional principles such as the rule of law, we have confined our engagement at this stage to these overall comments and to those chapters where the Ministry has particular expertise to offer (chapters 9 & 10). We will engage fully in the development of the Government's response to the final report.

Chapter 9 – Regulation and the Treaty of Waitangi

5. Draft chapter 9 effectively and clearly summarises the key issues for discussion in respect of the Treaty of Waitangi in regulatory design and practice.

6. An overarching Treaty clause which would require agencies administering Acts to incorporate the principles as appropriate would be a significant step and care would need to be taken in considering how this might be given effect; we support further consideration of this proposal. In addition, guidance on how to apply the Treaty principles varies and as a result practice is not consistent across agencies. For an overarching legislative clause to be effective the Government would need to ensure more work were undertaken to support and guide a collective understanding of the Treaty principles.

7. However, with over 60% of historical Treaty of Waitangi settlements completed, consideration of an overarching Treaty clause is a timely contribution to the Crown-Māori relationship as it moves into a post settlement environment. The Crown-Māori relationship and Treaty principles should be considered together. The government's understanding and application of the Treaty principles is a cornerstone of the Crown-Māori relationship.

Chapter 10 – Decision Review

8. Draft chapter 10 provides a useful overview of types of decision review and includes some good analysis. However, we are not sure that it makes full use of key resources on appeals and judicial review. The literature references, while very useful, could be more comprehensive. For example, there is only one reference to the work of the late Professor Michael Taggart, who had an international reputation on judicial review.

9. More detailed comments on this chapter (with page references) follow.

10. Pages 224-226: Most appeals in New Zealand are by way of rehearing. De novo appeals are often heard where the matter under appeal enters the court system for the first time and there might not be a reliable record of the proceedings conducted by the first instance decision-maker. Examples include appeal proceedings commenced in the Employment and the Environment Courts.

11. Page 228: In the final paragraph before the heading "Despite the overlap, significant differences remain" there is a quote from Justice Tipping from the transcript of a case in the Supreme Court. We would suggest it is more appropriate to quote from the judgment of the Supreme Court (Justice Tipping was the principal author). Comments from transcript do not necessarily reflect the views of Justice Tipping, the Supreme Court, or the New Zealand courts – they are the judge's testing of the arguments presented.

12. Page 230 and box 20.1: The UK Government announced decisions on proposals for reform of judicial review in February 2014. The Commission might wish to update Box 10.1 and associated comments in light of the UK Government's decisions.

13. Pages 232 – 233: In the discussion of internal review the Commission might like to add to the list the Legal Services Act 2011. Section 51 of that Act provides for a reconsideration of the Legal Services Commissioner's decision on an application for legal aid. The reconsideration is undertaken by a different staff officer. (The measure was first introduced by the Legal Services Act 2000 (now repealed).) We would also

note that internal reviews are suitable for low level decisions rather than complex economic regulation.

14. Pages 233 – 234: In the discussion of Ombudsmen the report should say that Ombudsmen are Officers of Parliament rather than officials responsible to Parliament.

15. Pages 240-1, Box 10.4: The discussion shows the complexity of reviews and appeals on input methodologies for regulating natural monopolies. We would suggest that consideration needs to be given to whether the duration, number of professionals involved and costs would necessarily change if court proceedings were replaced with an alternative. The nature of the issues and commercial significance of the decisions are a significant determinant of resource intensity.

16. Page 242: The quote of the Court of Appeal refers to a lack of empirical evidence as to whether administrative law modifies behaviour in government. While making a valid point the quote does not appear to support the point above, as is intended. The point above is about a perceived weakness in judicial review requiring a return to proper process, which might or might not result in a different decision. This is a separate issue. (The risk or threat of judicial review might alter behaviour before a first decision is made.)

17. Pages 243, Q 10.3: We note that among the judiciary there are judges who have considerable experience, arising from their previous experience as legal counsel, in regulatory proceedings. For example, Justice Arnold in the Supreme Court, Justice Miller in the Court of Appeal, and Justice Fogarty in the High Court were all involved in *Telecom v Clear Communications*, the leading s.36 Commerce Act case from the mid-1990s.

18. The Judicature Modernisation Bill allows for the establishment of specialist panels, for example a commercial panel, in the High Court. The Bill is currently before select committee.

19. Page 246, R 10.2: The Commission might like to give further thought to how it phrases this recommendation. As a general point court judgments do not undermine Parliament's objectives. We agree government departments should study leading judgments that test the legislative frameworks for which they have policy responsibility. However we would caution against any suggestion that legislative action might "correct" the court's interpretation of the law: this would be contrary to the rule of law. Legislative amendment might, however, be needed to ensure Parliament's objectives are clearly stated in statute.

20. Page 247: On institutional capability see comments above at paragraphs 18-19.

21. Page 248 and F10.15: We wonder whether it would be useful, alongside numbers, to examine the appeals from the Australian Energy Regulator involving Weighted Average Cost of Capital to ascertain to what extent earlier appeal decisions have narrowed the grounds for subsequent appeals and provided guidance to regulators in other decisions.

22. Page 249, Specialist Court/Tribunal: The report notes the Ministry of Justice's previous comments about the suitability of judicial decision-making to review decisions of input

methodologies. On institutional capability more generally, however, we refer again to the Judicature Modernisation Bill, which provides for the establishment of specialist panels in the High Court.

23. Page 250: We suggest further consideration be given to the discussion and finding on frozen records. In particular we would emphasise that in court proceedings involving appeals from other courts, it is a well established principle that new evidence may only be admitted at the discretion of the appellate court and that court must be satisfied that the new evidence could not reasonably have been available in the first instance.

24. Page 252: As at 1 May 2014 there are 39 High Court Judges.

25. Thank you for the opportunity to provide feedback to the Commission on the draft report. We look forward to receiving the final version later this year.

Yours sincerely

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Civil and Constitutional Group