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Regulatory Institutions and Practices Inquiry
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Commerce Commission Submission on the draft *Report on Regulatory Institutions and Practices*

1. Thank you for the opportunity to provide comment on the draft report on Regulatory Institutions and Practices.
2. The Productivity Commission has a considerable challenge in bringing together analysis and recommendations for a “regulatory system” where there is a wide diversity of functions, outcomes, and levels of performance amongst a broad range of regulators.
3. We would recommend that the Productivity Commission consider including the Police and Inland Revenue Department (IRD) within the scope of this work. Our view is that both the New Zealand Police and IRD have had an important role to play in the development of approaches to compliance and enforcement for regulatory agencies in New Zealand. We also work closely with Police (and other regulatory agencies) at an operational level when undertaking compliance and enforcement activities.
4. We typically find most value in comparing our performance to similar regulators in other countries rather than dissimilar regulators within New Zealand. In this context we have regulator contact and engagement with Competition Authorities and regulators in Australia, the UK, Europe, and the US.
5. For example, the Centre of European Law and Economics undertakes an annual evaluation and comparison of merger review systems in 70 jurisdictions world-wide. The evaluation looks at 16 aspects of performance including timeliness, transparency, precision, resourcing, and independence. This year we finished 5th equal place with the USA, well ahead of Australia and above the UK, Canada, France, and Germany.

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Chapter 3: Understanding the regulatory system

6. The report proposes that “standardised reporting requirements for annual reports” should be developed by Treasury and State Services Commission (SSC). The aim of this proposal appears to be to enable some kind of comparable information on regulator performance.
7. The Commerce Commission supports transparency and accountability in its performance. To this end, most of the information suggested in Table 3.1 is available through our annual report. We report on financial and non-financial performance consistent with public sector standards. In addition, we have put considerable effort into developing our approach to measuring the effectiveness of our work.
8. It is not clear to us, however, whether there is significant additional value in developing further rules for the standardising of regulatory performance beyond what is already required in current accountability arrangements.
9. The Commission supports benchmarking and comparison of performance where there is useful and pragmatic comparisons that can help it improve performance. For example:
 - 9.1 We use the Benchmarking Administration and Support Services (BASS) framework to evaluate our administrative and support services functions. While we are not one of the agencies directly involved in the programme, we actively use the BASS framework and metrics to benchmark ourselves against other agencies to identify strengths, weaknesses, and areas for improvement.
 - 9.2 During our recent work on funding for our Part 4 we undertook some analysis of our resource levels, FTE numbers, and other factors relative to our Australian regulators with similar functions associated with economic regulation.
 - 9.3 We regularly compare our performance to overseas agencies in areas such as timeliness of mergers, clearances and and authorisations.
10. This type of comparative work has additional value in promoting confidence for investors and other stakeholders in New Zealand’s regulatory system.
11. However, we would express some scepticism at the value of comparisons between New Zealand regulators with very diverse functions (from economic regulation to food safety) given the potentially costly exercise that could be involved in standardised reporting.
12. We would recommend instead that consideration be given to regulators and monitoring agencies work together to identify appropriate benchmarks for performance relative to similar overseas agencies. This kind of comparison would then inform central agency health checks of regulatory performance in New Zealand.

Chapter 4: Role Clarity

13. Box 4.1 identifies some examples that have been cited where overlapping regulatory regimes causing problems in relation to the Electricity Authority and the Commerce Commission under Part 4 of the Commerce Act.
14. We would note that the examples cited in the electricity sector are not related to “overlapping” or duplication of functions. The boundaries between regulatory functions are relatively clear and were worked through in some detail during the electricity sector reforms in 2011.
15. Most of the examples are really examples of the potential for complex interactions that can and do occur across the supply chain; and between market regulation and economic regulation of natural monopolies.
16. The Commission liaises closely with the Electricity Authority to mitigate the risk of unintended consequences. This involves both a formal memorandum of understanding, and regular meetings at an operational and governance level.

Chapter 7: Regulator Culture and Leadership

17. The report is right to highlight the importance of leadership in the promotion and development of organisational culture. The categories of organisational culture that are outlined in the report provide a useful starting point for thinking about organisational culture.
18. In our experience, third tier managers at the front line have a critical role to play in the culture and performance of an organisation. The Commission undertakes regular staff engagement surveys as a mechanism to promote effective performance within the organisation.
19. The results of these surveys typically show that managers of frontline staff have a critical role in staff engagement, and that investment in training and development in is critical to promoting change and performance improvement.

Chapter 8: Consultation and Engagement

20. The Commission supports the need for effective consultation processes. Our consultation processes have withstood significant scrutiny by the Courts in the last three years.
21. There is a constant challenge for regulators to balance the need for natural justice in consultation processes, while still moving at an appropriate pace to keep up with industry developments, and ensure timely decisions.
22. In our experience statutory obligations to consult can be helpful. However, sometimes common law principles - when applied to complex regulatory decisions - can create more stringent consultation obligations than minimum statutory duties.

23. We think there is also some value in the final report discussion the importance of other forms of engagement.
24. We have also developed a range of other approaches to stakeholder engagement that are useful (depending on the circumstances) including:
 - 24.1 Regular electronic newsletters;
 - 24.2 Recent development of a microsites for a specific issue;
 - 24.3 Targeted advocacy in specific sectors (such as the building sector); and
 - 24.4 Regular analyst and stakeholder briefings associated with market sensitive decisions.
 - 24.5 Education material such as guidelines and fact sheets. The Commission has produced over 43 guidelines and fact sheets over the last 2 – 3 years.

Chapter 10: Decision Review

25. The draft report provides a very useful overview of the merits appeal process.
26. As the Productivity Commission has noted, the High Court judgment merits case has come in since we wrote our last submission. The Commerce Commission's decisions came through the merits review process well.
27. Despite this success, the concerns expressed in our earlier submissions remain. The merits appeal process set up by Part 4 was slow, expensive and inefficient. It is unclear to us that this form of accountability would survive a cost/benefit analysis.
28. The report makes a number of useful observations and suggestions for considering merits appeals. We would highlight the following:
 - 28.1 Merits appeals can create some uncertainty, and that is not always resolved at judgment stage (p 249);
 - 28.2 The design and resourcing of merits appeals should be considered carefully in the light of the legislative or policy objective. Relevant considerations include resourcing, expertise of the tribunal, and involvement of consumers;
 - 28.3 It is likely that merits appeals are less effective for highly technical areas; and
 - 28.4 Consideration could be given as to whether a more inquisitorial process would be more appropriate in specific circumstances (p 249).

Chapter 11: Regulator Practice

29. The report provides an interesting analysis of the different forms of regulation.

30. There is a risk, however, of being too dismissive of responsive and conventional risk-based regulation based on the academic articles cited. The analysis in our view undervalues the different models of compliance which can be successful if effectively implemented.
31. For example, the Commission disagrees that that “responsive” regulation is “enormously challenging - indeed nearly impossible – in practice, for the responsive regulator to apply enforcement according to the responsive approach” (page 264).
32. The Commission has a history of taking successful prosecutions at the top end of the pyramid to egregious and detrimental breaches of the law. Our enforcement response register on the website shows how successful the Commission has been in achieving enforcement outcomes using a Braithwaite approach to compliance.
33. One recent example is the Air Cargo Case:

Example: Air Cargo Cartel

The High Court approved a settlement for a case against 11 airlines for colluding to impose fuel and security surcharges for air cargo shipments to and from New Zealand. The penalties totalled 42.5 million.

"The Commission is very pleased to have resolved this significant case in its entirety. Price fixing is unlawful and the penalties imposed in the air cargo case should be a deterrent to others who might breach the Commerce Act. The penalties are also a reminder to companies that it is important to have effective compliance programmes in place to prevent anti-competitive behaviour", said Commerce Commission Chairman Dr Mark Berry.

34. We have also undertaken compliance work at the lower levels of the pyramid to achieve effective outcomes for consumers. The following are some examples:

Example: Daily Deal Websites

Daily deal websites were causing considerable consumer harm overseas, resulting in high numbers of complaints to consumer protection agencies. When the sites started up in New Zealand, the Commission prioritised its response to the complaints received, and worked with the traders who operated these sites to describe how to improve their levels of compliance and reduce harm to their customers. The result has been a low number of complaints and a high level of ongoing compliance by the traders.

Example: Construction Sector

In 2010 we proactively identified the construction sector as being particularly susceptible to cartel conduct (e.g. price fixing agreements). Since then, we have prioritised our work in this sector. Initially, we sought to increase awareness of, and compliance with, the Commerce Act. We invested significantly in a targeted education initiative with the non-residential construction market with the aim of promoting competition.

Our targeted education initiative in the construction sector was comprehensive and wide-reaching. From late 2010 to mid-2012, we delivered presentations to numerous industry associations, government departments and other organisations. In addition, we published articles in industry publications. These publications have a combined potential readership of at least 40,000.

This work achieved an increase in awareness. By June 2011 we found that 30% of the 30 commercial firms we surveyed were aware of our education campaign and understood our messages. By June 2012 this figure had increased to 47%.

We were then well-positioned to undertake targeted advocacy in the context of the Christchurch rebuild, aimed at increasing stakeholders' awareness of the Commerce Act and Fair Trading Act risks. We recognised early the potential for anticompetitive conduct to occur in the context of the rebuild, and our work there is continuing as the rebuild gathers momentum. We have launched a dedicated website for industry participants to provide targeted guidance on competition and consumer law.

As a result of our proactive approach, we believe we are seeing an increasing number of complaints and enquiries involving the construction sector.

Example: Major Trader Programme

The Commerce Commission is committed to protecting consumer interests by working proactively with businesses to improve compliance with consumer laws. As part of our yearly risk assessment, we identify businesses that are generating a high number of complaints, are having a detrimental effect on consumers or markets, and are willing to work on improving their compliance levels. We invite them to participate in a 12 month programme to improve their compliance through open and constructive discussion. The result is improved compliance from participating businesses, with an accompanying reduction in the need for formal enforcement procedures.

Chapter 12: Workforce Capability

35. The Commission agrees that workforce capability is critical to delivering effective regulation.

36. The Commerce Commission takes workforce capability very seriously and finds the generalisations regarding system capability difficult to reconcile with its own experience.
37. The Commerce Commission focuses on building capability through a range of professional development initiatives (e.g. on the job training, secondments). The Commission's professional development budget is set at 2.5% of the salary budget and in 2013/14 the expected spend is \$496,000.
38. In recent years, the Commission has:
 - 38.1 Delivered communications training ("Plain English") to the whole organisation and was a finalist in the Plain English awards in 2013.
 - 38.2 Provided all managers with a tailored Management Development programme in 2013.
 - 38.3 Invested in compliance training through Australia, New Zealand School of Government (ANZSOG)
 - 38.4 Hosted Professor Malcolm Sparrow (in conjunction with the Financial Markets Authority (FMA)) who delivered customised workshops for us in Wellington and Auckland.
 - 38.5 Delivered regulatory economics and other specialist industry related training as required, and tailored to the needs of individuals and teams.
39. We note that the Productivity Commission refers to comments made by Business New Zealand and Vector, with Vector suggesting in one area that the Productivity Commission should include a recommendation "improving internal capability by requiring or expecting regulators ... to employ some staff with commercial experience and/or an industry background".
40. The Commerce Commission employs many people with private sector and/or industry backgrounds. In fact of the last 15 appointments made in the Regulation Branch of the Commission, 12 are from the private sector and/or industry. Alongside this, all Commissioners have come from the private sector and three of the four members of the senior leadership team have strong private sector backgrounds.
41. The report also cites the Public Services Association (PSA) survey as evidence of widespread lack of training opportunities for staff in regulatory roles.
42. The PSA survey results are not consistent with the Commerce Commission's internal engagement survey results.¹ Our 2014 engagement survey found that 82% of our staff agreed or strongly agreed that "this organisation ensures that I am adequately

¹ The engagement survey had a 89.4% response rate, is undertaken annually and is anonymous.

trained for the work I do” and over 75% agreed or strongly agreed that “there are learning and development opportunities for me”.

43. The Commerce Commission actively supports the work of the Compliance Common Capability Programme (CCCP) and sees value in a “community of interest” approach to the development of capability. This is more likely to be successful than the formal establishment of an overarching body.

Chapter 14: Accountability and performance monitoring

44. The Productivity Commission’s draft report proposes a number of measures to strengthen the monitoring of Crown Entities and Departments. The Commission supports clear accountability for its work, and supports the need for effective monitoring of our performance.
45. It is not clear to us, however, that the draft report either addresses issues that are unique to the monitoring and accountability of regulators (rather than government agencies more generally) or proposes solutions that are specifically relevant to a concept of a “regulatory system”.
46. In the current fiscal environment there needs to be clear measurable benefits for increased investment in back-office functions such as Crown Entity monitoring.
47. In our view, the most important additional investment that monitoring agencies could make would be in ensuring that there is a strong policy and strategic leadership and there is a strong relationship of trust between the monitoring agency and the regulator.
48. In our experience the monitoring relationship works well when:
- 48.1 Monitoring agencies demonstrate strong policy leadership and credibility in the areas that the regulator is responsible;
 - 48.2 There is mutual understanding of the relationship between government policy objectives and the regulator’s independent functions;
 - 48.3 There is mutual understanding of what good regulator performance looks like; and
 - 48.4 There is respect for the independence of the regulator, and a clear understanding by the regulator of the limits of that independence.
49. We trust that these comments are helpful and would be happy to discuss further.