Submission

By

to

The New Zealand Productivity Commission

on the

Regulatory Institutions & Practices Issues Paper

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REGULATORY INSTITUTIONS & PRACTICES
SUBMISSION BY BUSINESSNZ[1]
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1. INTRODUCTION

1.1 BusinessNZ welcomes the opportunity to comment on the Regulatory Institutions and Practices Issues Paper (referred to as 'the Paper').

1.2 Given BusinessNZ has consistently advocated for the New Zealand Productivity Commission (NZPC) to investigate regulatory frameworks, we are pleased to see this inquiry being undertaken. From our perspective, the quality of regulation is one of the most critical factors when it comes to providing for a competitive and productive economy.

2. SUMMARY OF RECOMMENDATIONS

2.1 BusinessNZ recommends that the New Zealand Productivity Commission:

a. ***Ensures its draft report includes recommendations that involve aspects of regulation that should be further investigated and/or new institutional arrangements that should be introduced (p.3);***

b. ***Revisit the Regulatory Standards Bill as a way to improve policy-making processes. (p.5);***

c. ***Include in any future regulatory guidelines a consistent set of principles by which all new regulations must abide (p.7);***

d. ***Take into account the significance or otherwise of world-leading regulations and harmonisation issues, as well as other factors associated with the relationship between the public and private sectors as outlined in our submission (p.14); and***

e. ***Take into account the examples provided in our submission when examining poor regulatory processes. (p.27).***

3. BUSINESSNZ'S OVERALL VIEW ON THE INQUIRY

3.1 BusinessNZ would first like to point out that it has not come as a great surprise that NZPC is undertaking an inquiry into regulatory institutions and practices. Both this organisation and other business associations have been advocating for some time that the NZPC should review regulatory coherence and consistency across infrastructure regulatory frameworks.

3.2 A question some of our members often raise (major members in particular) is why does New Zealand have different regulators regulating essentially the same network problems but in different ways. A situation such as this is not conducive to achieving efficient levels of investment. Therefore, we believe the NZPC could usefully recommend priorities for lifting regulatory

[1] Background information on BusinessNZ is attached in the appendix.

performance, finding ways to reduce the level of unnecessary and inconsistent regulation across infrastructure sectors.

3.3 Also, all NZPC's inquiries thus far have, to one degree or another, been examinations of the regulatory aspects of the chosen topic. These examinations have revealed varying degrees of regulatory quality and indicate that a broader inquiry into regulatory standards and practices is timely.

3.4 To ensure BusinessNZ's views are expressed as effectively as possible, our submission is in two parts:

- Part A: Examines our overarching thoughts and provides observations on regulatory institutions and practices; and

- Part B: Provides examples of poor New Zealand regulatory institutions and practices.

Overall, we would welcome follow-up discussions with NZPC if there are aspects of our submission the Commission wishes to clarify or on which it would like further context.

PART A: OVERARCHING THOUGHTS & OBSERVATIONS

Context of what the Commission has been asked to do

4.1 The Government has asked the NZPC to examine how the design and operation of regulatory regimes and their regulators can be improved – ultimately to improve regulatory outcomes.

4.2 The Paper's first chapter outlines what is and is not included in the inquiry and covers certain aspects to which the Commission has been asked to give particular attention. The issue of regulation can be all-encompassing and we sympathise with the NZPC that some limitations have been imposed. But without limitations the inquiry could end up as a servant to all and a master of none.

4.3 An examination of the 61 questions asked shows just how difficult the challenge will be for NZPC to adhere to the stipulated boundaries. From our perspective, two issues stand out. First, despite best efforts, many submitters, including BusinessNZ, will have to look beyond the parameters set to make sure our comments, views and concerns are properly understood. This is the reality of examining regulatory processes and practices and should assist with any further development work NZPC may undertake.

4.4 Second, although the questions are trying to pinpoint replies on particular aspects of the review, in reality there will be a considerable cross-over of answers, especially where an example outlined in response to one question will also be relevant to others. Therefore, instead of providing an answer to each question, our submission generally gives an overview of examples and situations, leaving it to NZPC to decide where these best fit into the inquiry.

Leaving a legacy - beyond the inquiry into regulatory institutions and practices

4.5 The Paper's first question asks submitters what sort of institutional arrangements and regulatory practices the Commission should review. Figure 1.1 outlines the institutional arrangements and regulatory practices to be examined, encompassing a considerable number of issues. We believe the 13 aspects outlined are important factors for raising the quality of regulation and will provide comments on various aspects of these in our submission.

4.6 As we have indicated to NZPC during preliminary discussions, BusinessNZ is very conscious of the fact that this cannot simply be a 'point-in-time' inquiry that effectively ends with a set of recommendations that government may or may not take up. This in-depth analysis of regulatory institutions and practices in New Zealand is too important to disappear from the wider government consciousness. As noted, all previous NZPC inquiries have had regulatory aspects. The decision to stage a separate inquiry into occupational licensing in the services sector already provides one example where there is further work to be done.

4.7 Therefore, when the draft report is released in February 2014, BusinessNZ would expect two sets of recommendations:

1) Those outlining system-wide recommendations on how the operation of regulatory regimes can be improved over time; and

2) Those involving aspects of regulation that should be further investigated and/or new institutional arrangements that should be introduced.

In short, the inquiry should provide some form of legacy that will look to build on the current work and also provide new directions for improving New Zealand's regulatory regimes.

Recommendation: That the New Zealand Productivity Commission's draft report includes recommendations that involve aspects of regulation that should be further investigated and/or new institutional arrangements that should be introduced.

An effective Regulatory Standards Bill

4.8 Figure 1.1 also shows process boxes before and after the *'regulator incentives and resources'* box that this inquiry is primarily about, namely *'Government and Parliament decision to regulate'* and *'quality of regulatory decisions'*. Obviously, these boxes are inextricably linked, so it is worth examining any overlying issues that cover all three aspects of the regulatory decision-making process.

4.9 BusinessNZ has, for a number of years, strongly advocated for the introduction of an effective Regulatory Standards Bill (RSB), modelled on the work undertaken in 2009 by the Regulatory Responsibility Taskforce. BusinessNZ believes NZPPC's future work on regulatory practices should involve the consideration of a Responsibility/Standards Bill, a view we would

like briefly to discuss, given the broader importance of such a Bill in the context of regulatory institutions and practices.

4.10 Table 1 below summarises the various steps taken so far in the attempt to introduce an RSB. As can be seen, first steps go back close to seven years, including two bills, two rounds of feedback requested by the Select Committee, the establishment of and report back by the Regulatory Responsibility Taskforce and a final push by interested parties to the Minister for Regulatory Reform.

Table 1: Consultative path towards a Regulatory Standards Bill to date

Date	Government/Select Committee	BusinessNZ Response
August 2006	Regulatory Responsibility Bill introduced	BusinessNZ submission
February 2008	Invitation on feedback on further options	BusinessNZ submission
September 2009	Report of the Regulatory Responsibility Taskforce	BusinessNZ letter to Minister for Regulatory Reform
July 2010	Questions arising from the Regulatory Responsibility Bill released	BusinessNZ submission
March 2011	Regulatory Standards Bill introduced	BusinessNZ submission
September 2012	Letter to Minister of Regulation	BusinessNZ Letter

4.11 We believe the process leading up to the RSB in 2009 was extensive, including not only the timeline of events set out above but also the various discussions at forums and conferences where the spotlight was placed on some form of RSB.

4.12 The Bill provided a benchmark for good regulation through a set of regulatory principles that all regulation should comply with. And it provided for transparency by requiring those proposing and creating regulation to certify whether it was compatible with the Bill's standards, providing also for monitoring of the certification process by creating a new declaratory role for the courts.

4.13 Therefore, BusinessNZ and others in the business community were extremely disappointed when the Regulatory Responsibility Taskforce's report was effectively gutted, with Treasury proposing a regime likely to be ineffectual in improving the quality of regulatory decision-making. While the revised RSB had no aspects we would vigorously oppose, it had nowhere near the heft or clout the initial RSB would have had in terms of raising the quality of regulation in New Zealand.

4.14 Given the importance of sound regulatory decision-making in supporting New Zealand's sound fiscal and monetary policy (epitomised by the Reserve Bank Act and Fiscal Responsibility Act, now part of the Public Finance Act), BusinessNZ believes it is crucial that the opportunity to implement a sound regulatory process should not be lost.

4.15 While the Government has rightly recognised the importance of regulatory reform in building a more productive and competitive economy, it has failed to take the critical step of ensuring that not only are regulatory incentives and resources sound, but also that the any decision to regulate is firmly based and the quality of regulation improved.

Recommendation: That as part of the broader work programme following on from the regulatory inquiry, the New Zealand Productivity Commission revisits the Regulatory Standards Bill as a way to improve policy-making processes.

Future guidelines to assist the design of regulatory regimes

4.16 Question two asks what type of guidelines would be helpful given the Commission has been asked to produce guidelines that assist in the design of regulatory regimes.

4.17 While we believe a proper RSB would go a long way towards setting out guideline principles, we are also conscious of the need to consider certain fundamental issues relevant to a proper regulatory process. Government has spent considerable time and resources over recent years in ensuring the establishment of a proper regulatory process but in many instances the process is not followed or has attracted only cursory interest. This has in turn meant that the quality of particular documents, such as Regulatory Impact Statements (RIS), varies considerably. Therefore, we wish to outline some fundamentals to be included in any future guidelines.

Proper review process

4.18 Before opting for a regulatory approach, the nature of the problem should first be fully understood, who is affected by it, the costs of taking action and who will bear those costs. Regulatory intervention, because of its cost, should generally be a last resort to be engaged in only when all other cost-effective approaches have been exhausted. In order to justify government intervention, there must be a clear case of market failure and the market failure problem must be significant.

4.19 Given that markets are generally faster at self-correcting than governments are at intervening, the onus of proof must be on government to prove beyond reasonable doubt that the benefits of intervention will exceed the cost, including unintended any costs associated with regulation (such as non-compliance).

4.20 Regulators generally have strong incentives to minimise their own risk by imposing higher standards than might arguably be justified. Because they do not bear the costs associated with their decisions (costs will ultimately fall on consumers), they may well over-regulate rather than take into account or adequately consider, the cost/quality trade-offs consumers are willing to make.

4.21 BusinessNZ is disappointed that too often papers and discussion documents start off on the wrong foot by not asking the fundamental question *"is there a problem?"* before considering any change to regulatory practices. We would

go further, asking policymakers to consider some related questions, including but not limited to:

- Is there a problem *in New Zealand* with the current law (i.e. are there significant issues of "market failure" which need to be addressed)?
- If there is a problem, is the problem significant?
- What are the costs and benefits (including unintended costs) of any proposed changes outlined in the document?
- Are there options for improving outcomes which do not impose significant costs (e.g. by educating market participants)?

4.22 Unfortunately, government papers often fail to provide in-depth of coverage of these particular questions, so much so that in recent years BusinessNZ has repeatedly indicated to government the importance of proper process when looking to introduce, or amend existing, regulations.

4.23 In the paragraphs that follow, this submission expands on the above four points.

Market Failure – a possible case for government intervention?

4.24 Before determining whether increased regulation and/or other interventions such as enforcement are justified as part of sound policy, it is first necessary to determine on what grounds government might decide to intervene.

4.25 Generally markets work best when left undisturbed by government intervention - regulation/taxes/expenditures. But at times markets may not perform efficiently so that possibly, government intervention is justified. The question then is - is there evidence to show a significant problem?

Does the evidence show a significant problem?

4.26 BusinessNZ has often seen documents referring to the fact that a move towards regulatory intervention is hard to justify given the evidence of a significant problem is lacking. In other words, it is clear from officials' own words that there is little justification for regulatory change.

4.27 Even with grounds for significant change, the change process must be approached in a systematic way. Widespread government-led regulatory measures must start from the position of minimising any distortion or unintended consequences a proposed intervention might produce.

The Correct Path of Action to Take

4.28 Instead of viewing government-led regulation as the first and only solution to any perceived problem, in BusinessNZ's *'Regulation Perspectives'*[2], we

[2] http://www.businessnz.org.nz/file/1053/Regulation%20Perspectives.pdf

stipulated nine actions that could be adopted to improve the quality of New Zealand regulation. Of these, the following six actions relate to issues raised in a number of discussion documents/papers:

a) *Define the Problem:* Require all proposals for regulation to include a clear analysis of the problem to be addressed.
b) *Do a Cost Benefit Analysis:* Require all proposals for regulation to include a cost-benefit analysis by an independent agency that provides a service similar to that of the Productivity Commission.
c) *Travel up the Pyramid:* Consider non-regulatory options first, moving 'up the pyramid' to generic light-handed options, with more stringent options only if clearly warranted.
d) *Keep it Generic, Light-Handed:* Give preference to light-handed generic regulation.
e) *Regulate only when required:* Introduce new regulations only when justified by clear cases of significant – not minor – market failure.
f) *Self-Regulation as a Goal, not a Pathway:* Self-regulation should not be introduced as a precursor to future government-imposed regulation; instead it should be allowed to stand on its merits.

Quality of regulation is not a numbers game

4.29 BusinessNZ also takes the view that government should always focus on the quality of regulation, not the quantity. While we approve of the Government's policy of less regulation, we are also mindful that improving regulation is not about balancing the number of regulations towards a supposed optimal number.

4.30 A policy to improve regulation is not simply a numbers game; it involves looking separately at each piece of regulation, making sure it is adequately scrutinised before determining whether or not it should go or stay.

4.31 Of the six actions listed in 4.28, action (c) is the key step when regulatory decisions are contemplated. BusinessNZ would strongly oppose any moves by government that led automatically to the 'tip' of the regulatory pyramid. Should action be needed, the proper approach is to start from the base up.

4.32 Therefore, regarding the type of guidelines to be provided, BusinessNZ believes these should include a consistent set of principles applicable to all new regulations.

Recommendation: That any future regulatory guidelines produced by the NZPC include a consistent set of principles by which all new regulations must abide.

New Zealand's regulatory style and characteristics

4.33 Question 3 asks whether as a result of specific characteristics, New Zealand has (or needs) a unique regulatory style. Question 4 asks what influence New Zealand's specific characteristics have had on the way regulation is designed and operated here. We believe these are useful questions as regulators often

focus narrowly on a certain regulatory path, without taking into account the nuanced traits of the country in question.

4.34 From BusinessNZ's perspective, there are two issues at play and a number of observations we wish to make:

a) The type of regulation best for the New Zealand situation; and

b) The process by which New Zealand regulations are conducted.

New Zealand having or needing a unique regulatory style

4.35 On balance, BusinessNZ doubts whether a unique regulatory style is needed. To some degree, every country has its own unique regulatory aspects distinguishing its regulatory processes and practices from those of other countries (i.e. no two countries are exactly the same). However, while acknowledging that New Zealand's regulatory style has some unique aspects, as most Western-style countries have a core regulatory similarity, these should not be given unnecessary weight when regulatory settings are established.

4.36 If we had to pin-point what makes our style unique, a contributing factor would be the pragmatic approach often taken to influences affecting our country. For instance, as a nation we realise that border controls and safety must be of an extremely high standard given the potential economic costs if certain diseases are found here or outbreaks occur. On the other hand, we recognise that the financial reporting requirements for small-sized businesses do not need to be the same as for large-sized businesses, so we have threshold limits relevant to the New Zealand context.

4.37 Whether the level of pragmatism shown in regulatory decision-making is greater or less than that of other countries is obviously difficult to ascertain. But what it tells us is that it is probably not the case that New Zealand's style falls into a different class compared with that of other countries; there are differences, but few that many other countries will not also face.

4.38 Looking beyond the issue of a unique regulatory setting, a number of observations have been made by BusinessNZ over recent years when submitting on government papers and in interactions with officials. These observations may not be game changers but collectively they provide an indication of where it is considered improvements could be made across the whole of government.

First in the world and world leading?

4.39 Too often BusinessNZ has seen both government and indeed the general public take the view that we should be world-leading or the first in the world to introduce something. This can sometimes be beneficial while at other times it can lead to unintended consequences, in some instances creating significant distortion. Too often policy makers do not understand that there is an inherent risk in taking this approach if we cannot see the unintended consequences

that will lie ahead once such a decision has been made. The alternative, being a fast follower, makes it possible to observe both the mistakes that have been made and the actions that were successful.

4.40 New Zealand's desire to lead is perhaps due to the continuing highlighting of previous times where key events have put us on the world stage. While, in 1893, being first in the world to give women the vote was a significant and positive leap forward for male and female equality, the universal (cradle to grave) welfare was introduced at a time when New Zealand's structure was very different from today, with very different outcomes in terms of affordability over time.

4.41 On a positive note, other world firsts, including the Reserve Bank Act and the Fiscal Responsibility Act, have by and large provided for a more stable economic setting but were first well-debated and analysed to ensure their success.

4.42 BusinessNZ's concern is that our current culture often sees it as important to make New Zealand first in the world or world-leading and that as a consequence, many policy proposals fail to identify the benefits and costs that ought first to be considered. But of itself being first in the world or world-leading is neither a benefit nor a cost; it is simply a consequence of whatever action is taken. Being first in the world or world-leading may give rise to costs or to benefits but these possibilities are seldom considered during the regulatory process. Often, too much weight is given to treating something as important when it is not.

New Zealand as a part of a global regulatory system

4.43 An opposite, but equally dangerous practice also capable of producing a poor outcome stems from a desire to harmonise New Zealand's regulations with those of other countries. BusinessNZ agrees that many regulatory systems are now global and that there are issues that governments acting alone cannot address, including banking and financial regulation, intellectual property matters and concern to limit the spread of infectious diseases. But, as the Paper points out, while this can have a number of advantages, it can equally be disadvantageous, especially, as the cited Conway (2011) quote indicates, where an exceptionally good regulatory environment is needed to help mitigate the impact of economic geography on economic performance.

4.44 BusinessNZ appreciates that New Zealand does not live in isolation from other countries. International movements and trends have to be taken into account when domestic regulations/laws are examined, much as the private sector needs to observe and respond accordingly to consumer trends or product changes offshore. We also agree that a high quality regulatory structure can provide New Zealand with a competitive advantage. However, this can quickly be eroded by the introduction of either low quality off-shore regulation or regulation that does not properly fit the New Zealand context.

A Government preoccupation with alignment with Australia

4.45 In various regulatory investigations, the aim of aligning with our closest economic neighbour – Australia - has been strongly evident throughout many areas of government. In some instances, this has been explicitly stated in discussion documents or in a Bill's explanatory note, where alignment with the Australian Law is one of the policy objectives.

4.46 BusinessNZ supports moves that lead to closer economic relations between the two countries but we have always taken the view that any form of harmonisation should only occur if there is a clear net economic benefit to New Zealand. We are increasingly of the view that the debate around trans-Tasman harmonisation has become far too simplistic in regard to regulatory change and as a consequence tends to overlook some fundamental differences when endeavouring to decide what should or should not be considered for harmonisation. The government push towards harmonisation is often viewed as an end in itself, an overwhelming reason for change. This view, however, overlooks subtle differences associated with the need for regulatory change.

4.47 For instance, there may be some harmonisation options where perfect alignment makes sense as it reduces transaction costs between the two countries. There may be other regulations that New Zealand should pick and choose from, given Australia has had them for some years, providing New Zealand with the benefit of hindsight. Last, there are some Australian regulations which for competitive purposes are clearly unpalatable from a New Zealand perspective, either because they would simply not fit with New Zealand's associated laws or would place greater regulatory requirements on New Zealand businesses. Regulations of greatest concern to BusinessNZ are those which reduce our competitive ability, resulting in stunted growth.

4.48 As with the issue of wanting to be a leading nation when it comes to policy development, we believe harmonisation with other countries - particularly Australia - receives too much weight in government papers given other factors at play.

Engagement and relationship between the public and private sector

4.49 We believe the broad relationship between the public and private sectors is a key feature requiring analysis when looking to improve regulatory institutions and practices. While this relationship has multiple facets and features, the following outlines some observations and trends we have noticed in our dealings with officials.

Cultivating formal and informal relationships...

4.50 One aspect of the New Zealand style of engagement and regulation-making we believe provides an advantage is the often informal nature of public-private discussions on aspects of regulations up for review or likely to be introduced since it allows for more pro-active involvement.

4.51 While New Zealand's small population means we have issues of scale, it also provides greater opportunities for direct communication. In many instances the same group of officials will talk to the same private sector groups and individuals that have expert knowledge of a topic or a strong interest in how a policy proceeds. This means that in many cases an informal relationship can be developed, where a simple catch-up over coffee or a chance meeting can lead to free and frank discussions. The obvious drawback is that officials may not look to consult further or may pick and choose who they talk to. However, on balance, we consider this ability for officials and private sector representatives to have open dialogue leads to better outcomes for the country's growth prospects.

…but these are not at the level they used to be.

4.52 While we believe that informal discussion where relationships can be built is beneficial to policy development, BusinessNZ is disappointed that the overall level of free and frank discussion and exchange of ideas between the public and private sectors, commonplace in the 1980s, has not carried through to today, particularly among certain groups of officials. We understand the inherent risk of information and statements becoming public when ideas are in their development phase, particularly when deliberately or accidently forwarding information to wide numbers of people is as simple as pressing a few buttons. However, at the same time it is important for officials to recognise that the vast majority of interest groups discuss ideas and topics with government with good intentions and are not looking at ways in which to exploit any information provided.

Private sector advisory groups

4.53 While private sector advisory groups established by government on specific issues are nothing new in an international setting, it would be fair to say that a number of government departments and agencies in New Zealand have only recently come round to using them when seeking to determine the best policy options.

4.54 Some Government departments, such as IRD, have been using private sector advisory groups for a number of years, with certain groups re-formed after a period of time as further changes are proposed or in some instances, a new survey is established. While advisory group recommendations do not have to be accepted, they do provide government agencies and departments with free and frank assessments of ideas put forward, or options that may or may not work.

4.55 Obviously, a private sector advisory group would not be required in every instance. However, if officials have a good understanding of certain, possibly contentious, issues or an agreed outcome that may be debatable, spending time to build relationships with key players in the private sector via a group of this nature can provide a good pathway to quality decision-making.

Governance is important

4.56 BusinessNZ believes governance is important, specifically the extent to which the regulator is independent of Government. For example, the Electricity Commission (which is discussed more fully in part B of our submission) combined the worst practices of having multiple and confused objectives, a board appointed exclusively by the Government of the day and a requirement to have regard to the government policy statements. In other words, the industry had absolutely no long term certainty. Ironically, this led to the explosion in the growth of the political market, as industry turned away from trying to influence the design of the electricity market, and instead lobbied Government rather than apply its effort at influencing the regulator.

4.57 In contrast, it is interesting to note that the gas industry company is owned by its shareholders who appoint its board of directors, along with some independents who represents consumers, yet it regulates the gas market much like the Electricity Authority regulates the electricity market.

People and private sector experience matter

4.58 While we believe that overall, the quality of New Zealand's public sector workers is good, it is unfortunately true in a small country the size of New Zealand that having the right people in the right positions matter. We have a limited gene pool of suitable qualified individuals, and often industry is left to try to influence the regulators to arrive at a reasonable outcome rather than the law being clear enough to steer then in the appropriate direction.

4.59 Also, while we consider the establishment of private sector reference groups (as discussed above) as an important step, sometimes these groups are needed because of a lack of understanding of the private sector's viewpoint when regulations are formulated. We believe the public sector as a whole requires a greater number of employees with significant private sector experience so they can bring their own insights into regulatory decision making and pick up on potential unintended consequences. A halfway house for this might be the increased use of secondments between the private and public sector, whereby private sector experts from certain entities are brought in to assist on issues from a market perspective. Alternatively, certain public sector workers are given the opportunity to better understand the markets they regulate through a dedicated work programme at a private sector entity.

Advice to lift engagement - GOES project

4.60 On the subject of public and private sector engagement, question 47 asks what forms of engagement are appropriate for different types of regulatory regime and when do formal advisory boards work well, or not. Our comments above obviously answer some of these questions but we would also point to a useful example of an advisory board not only with public and private elements but which has looked as well to increase stakeholder engagement more generally. This is the Government Online Engagement Services (GOES) project, led by the Department of Internal Affairs (DIA) and established part

way through 2012. For over a year, its members were able to meet to work through various development issues.

4.61 The aim of the GOES project was to develop an online consultation service for multiple central and local government agencies to use to cost-effectively and meaningfully engage with their stakeholders through the internet. Because the project team included a range of officials from various departments, as well as representatives from various sections of the private sector (including business, community and local government), the project was able to work through previously identified issues and to identify additional potential pitfalls, particularly where similar projects have been undertaken and to note the lessons that should be learnt.

4.62 The GOES project exemplifies the key characteristics we have identified above for ensuring a stronger working relationship between the public and private sectors. Therefore, we believe it would be worthwhile for NZPC to discuss the project further with DIA. The Department will be able to provide the Commission with more details which could be incorporated in its draft report.

4.63 Last, in recent years we have noticed that some investigations have included, as part of the consultation process, a draft Bill for comment. While we welcome this additional step, we still at times see poor regulatory processes with often an often illogical disconnect between the recommendations of some discussion documents and the Bills that follow.

4.64 In terms of process, a draft exposure Bill should usually sit between a discussion document and the Bill that goes before Parliament. However, we would equally support a draft exposure Bill as a first port of call for the public to submit on, if the previous background work has included other processes such as a conference/summit, or a series of private discussions with individuals or groups that would be most affected by the proposed regulatory change. We would be supportive of a step of this kind becoming more of a regular feature when summits are held or discussion documents are presented in order to accurately ascertain the changes required.

Authority funding – a constant bug-bear

4.65 Lastly, one area of Government practice where a number of industries have found unbalanced involves the funding methods of various authorities, for instance the Electricity Authority and the Energy Efficiency & Conservation Authority (EECA). This was instituted on the establishment of the Electricity Commission by the then Labour Govt, simply as a means to reduce the additional cost to taxpayers on their establishment as Crown agencies, but has survived with the establishment of the Electricity Authority.

4.66 The move to have the Electricity Authority and a portion of EECA funded by industry has no basis in principle, but was purely a method to avoid taxpayers having to fund their establishment. Therefore, we would question whether the co-funding by industry of both the Electricity Authority and EECA is consistent

with the Treasury user-pays principles. And again, this differs to the gas industry company model.

Recommendation: That the New Zealand Productivity Commission takes into account the significance or otherwise of world-leading regulations and harmonisation issues, as well as other factors associated with the relationship between the public and private sectors outlined in our submission.

Decision review and appeal

4.67 Questions 26 to 28 seek views on the review and appeals processes provided for in New Zealand regimes, including examples where these are either well-matched or poorly suited, together with the possible advantages and disadvantages of a general merits review body. BusinessNZ wishes to take the opportunity to indicate why we believe merit reviews are an important for the New Zealand economy.

Merits Appeals (Reviews)

4.68 As a background, the second report of the Land and Water Forum (LWF) in April 2012 recommended that the right to take appeals to the Environment Court against Council plan decisions on freshwater should be seriously restricted. In response, BusinessNZ produced a paper outlining why merit appeal rights are important, highlighting the following points:

Why are merit appeal rights important?

4.69 There is a strongly held view that merit appeal/review rights are essential in societies that fully respect fundamental rights. They can be seen as a safeguard or safety valve and there are a number of important reasons for continuing to promote such rights across a whole range of statutes.

4.70 The reasons for supporting merit appeal rights are outlined below but are not necessarily listed in any order of importance. Every reason is important in its own right:

1. The prospect of scrutiny (appeals) will likely encourage primary decision-makers to make better and more careful decisions in the first place;

2. Appeal decisions can often lead to better and higher quality outcomes given a fresh look at the issues;

3. Some regulators have very wide powers that leave them, in effect, the rule makers. It is simply wrong that regulators should act as final judge and jury on the application of their own rules;

4. The risk of excessive individual influence on decisions is reduced by the right to take a decision to an outside body;

5. There is more confidence in the integrity of the law, and support for it, when there is at least one full right of appeal;

6. The parties crystallise the key issues better on their second run through a case;

7. The more elevated view of the appellate court makes it easier to extract principles of general application and decisions are more likely to be stated in terms which allow people to predict how the law will work in future; and

8. Appeal rights provide protection for property rights and thus create the conditions for investor confidence and economic growth.

4.71 These are all important issues. Inferior decisions generate uncertainty. Poor decisions force businesses into expensive second best 'work arounds' to cope with the risk of uncertainty or arbitrary intervention. Poor precedents threaten investment and economic growth although people may not be able to measure or even recognise the source of such costs. The difference between high quality predictable decisions and low quality ad hoc readings can be enormous for a small economy like New Zealand.

4.72 Removing the right of appeal, as proposed by the LWF, is a serious matter which should be thoroughly considered, particularly in regard to the potential impact of plan changes on user rights to freshwater.

4.73 Full rights of appeal are embedded in much New Zealand legislation (and overseas in that of many OECD countries). In light of the importance of water to many large infrastructure users, any changes to such an established framework should be made with a significant degree of caution, recognising their potential implications for the wider economic and investment environment.

PART B: EXAMPLES OF POOR REGULATORY PRACTICES

5.1 Questions 6 to 61 ask for various examples to assist with the inquiry. We appreciate that as stated in the terms of reference, *"the inquiry is not a review of individual regulators, specific regulations or the objectives of regimes"*. However, at the same time there is a need to examine the success or otherwise of specific regulations to get a better handle on where improvements to the design and operation of regulatory regimes can be made.

Regulatory Letter to Ministers and Head of Government Departments

5.2 Obviously, the relationship between the economic agenda of a Government and the related regulatory costs is important in terms of ascertaining whether new of changed policies has an overall positive or negative effect on the country. To this end, earlier this year BusinessNZ become increasingly concerned about the growing disconnect between the Business Growth Agenda (BGA) of the Government and the various new and proposed regulatory costs being placed on business.

5.3 To outline our broad concerns, we wrote a letter that was sent to various Ministers and Heads of Government Departments. The letter also included eleven examples of what we deemed to be poor regulatory decisions made across Government. We have included the letter as an appendix to this submission[3], and we would like to point out that some of the examples outlined in the letter have also been included below, but are discussed more fully to assist the NZPC in their inquiry.

5.4 Also, we note that box 1 outlines what makes a good case study. Ideally, the examples provided should meet all ten requirements, although this will rarely be the case. Overall, the examples we have chosen to include below are situations in which BusinessNZ has in some way been directly involved. They demonstrate what we perceive to be poor regulatory processes that NZPC could learn from and which might assist in the Commission's inquiry.

Consumer Law Reform – Consumer Law Enforcement Provisions

5.5 BusinessNZ believes the course of action that led to the introduction of certain enforcement provisions as part of the Ministry of Consumer Affairs' consumer law reform is an example NZPC should in particular study in-depth and include in its draft report. The actions taken clearly show the use of a poor regulatory process in the New Zealand context.

5.6 While we do not wish to go over every aspect of an investigation that began in 2006 and ended with a Bill in 2012, we would like to make some overarching comments on why NZPC should include this example in future work so that lessons can be learnt.

5.7 From BusinessNZ's perspective, there were three clear reasons, evident right throughout the process, why enforcement provisions such as the unconscionable conduct provisions should not be introduced in New Zealand:

a) At no stage over the last six years has the Ministry put forward a clear evidence-based argument of the need to have enforcement provisions in New Zealand's consumer law;

b) The majority of submitters both in 2006 and 2010 strongly opposed the introduction of enforcement provisions for various valid reasons; and

c) Beyond the Ministry for Consumer Affairs, other key government departments such as Treasury did not believe there was sufficient evidence to introduce such provisions, as stated in paragraph 114 of the paper to the Cabinet Economic Growth and Infrastructure Committee:

'Introducing unfair and unconscionable contract provisions will involve compliance costs for business and the few anecdotal cases identified in submissions suggest that the benefits of these provisions are unlikely to exceed the costs. These provisions also have the potential for significant unintended consequences in relation to the conduct of economic activity

[3] See appendix 2.

and contract enforceability. In light of these risks, Treasury recommends delaying decisions on introducing unfair and unconscionable contract provisions for two to three years to allow evidence from their introduction at the Commonwealth level in Australia to be considered.'

5.8 BusinessNZ was therefore at a complete loss when the Ministry persisted in wanting to introduce enforcement provisions when various business and legal submitters had outlined strong and valid reasons why these should not proceed. So much so that one could ask why public submissions were even requested if the majority of submitters were to be repeatedly ignored.

5.9 Also, BusinessNZ did not believe the Ministry of Consumer Affairs' analysis reflected either the Government's overall statements on better regulation or the Treasury's Regulatory Impact Analysis (RIS) handbook. As an example, the Government's statement on regulation entitled *Better Regulation, Less Regulation*[4] outlines two commitments. The second states:

"We will introduce new regulation only when we are satisfied that it is required, reasonable and robust; and

"We did not believe any of these requirements for new regulation had been met by the Ministry since they began to investigate enforcement provisions in 2006.

5.10 The process was further hampered by a constant changing of the Minister of Consumer Affairs. The game of musical chairs meant that none of the new Ministers had any historical knowledge of the review and were told only one side of the story by officials. This meant the private sector was continually playing catch-up to make the Minister fully aware of both sides of the argument.

5.11 With the time span involved and given the different facets of policy development, we strongly recommend that NZPC include the Consumer Affairs' approach as an example of what can be wrong with many aspects of the regulatory process. BusinessNZ is happy to discuss the matter further with NZPC if required.

Criminalisation of hard-core cartel behaviour

5.12 In a similar vein, BusinessNZ submitted on a discussion document in 2010 that examined the issue of criminalisation of hard-core cartel behaviour. During the discussion document phase we outlined various concerns associated with the problem definition.

Failure to establish the extent of the problem of hard-core cartel behaviour in New Zealand

5.13 While the discussion document at the time asked a series of questions about detecting and deterring cartels, defining the offence, criminal procedures and

[4] Released by Hon Bill English and Hon Rodney Hide on 17 August 2009.

penalties, it made little attempt to establish the extent of the problem of hard-core cartel behaviour in New Zealand. Although the document was 98 pages in length, there was not a single recent New Zealand case study outlining hard-core cartel behaviour. Not only that, but absolutely no attempt was made to provide a timeline showing that hard-core cartel behaviour was an issue increasingly warranting attention.

5.14 Even if examples had been provided, this would not automatically have meant that action was needed. Instances of hard-core cartel behaviour are likely to be sparse and have had little effect on the economy if they occur. If there was evidence showing significant market failure arising from cartel behaviour in New Zealand, then we would have supported the imposition of strong penalties. But without any idea of the extent of the problem, it was extremely difficult to approve any of the options for change outlined in the document.

5.15 We also noted that the Ministry released an occasional paper entitled *'Criminalisation of Cartel Behaviour'*. While we understood that the views, opinions, findings, conclusions and recommendations expressed were strictly those of the author and did not necessarily reflect the views of MED, again there was no attempt to provide analysis of the extent of the problem in New Zealand. Both documents represented the expenditure of a sizeable amount of time and resources without taking into account what should be a standard regulatory investigation process.

Aligning New Zealand with offshore practices

5.16 In relation to our discussions above, New Zealand's alignment with offshore treatment was stated as a major factor for wanting to introduce the proposed changes. In particular, the Single Economic Market agenda with Australia was considered an important influence. While we believe it is important to understand offshore regulatory processes and how New Zealand fits with these, we also urge caution; any alignment with other countries should happen only if there is a significant net benefit to the New Zealand economy. Otherwise, we will be introducing regulatory regimes that in many instances create a net cost and hamper any competitive advantages the country might have in the regulatory field.

Comments by the Minister of Commerce

5.17 Last, in addition to the document itself, comments from the Minister and others at the time appeared to reflect the view that the proposed changes were a faît accompli. If that were so, we believed it would undermine the document's purpose which was, or should have been, to gauge views from the public and make regulatory changes taking those views into account.

5.18 Although a subsequent draft exposure Bill and revised RIS were released, further poor analysis and subjective government decision-making meant BusinessNZ recommended making no cartel-related changes to existing

competition laws until such time as another investigation had been conducted, taking into account our concerns[5].

KiwiSaver – a sizeable policy based on weak foundations

5.19 Of itself, KiwiSaver represents a significant shift in the mind-set of retirement savings for a large number of New Zealanders, with any change to the scheme having the potential to affect literally hundreds of thousands of New Zealanders. As a significant policy, it will most probably remain a large feature of New Zealand's savings landscape for many years to come. However, at the same time it was a policy introduced on weak foundations which have still not been addressed.

5.20 The KiwiSaver Bill in 2006 stated that KiwiSaver's purpose was to *"encourage a long-term savings habit and asset accumulation by individuals who are not currently saving enough, with the aim of increasing individuals' well-being and financial independence, particularly in retirement"*. This was certainly a laudable purpose statement and there was much that BusinessNZ agreed with when we submitted on the discussion documents leading up to the Bill, as well as in the Bill itself.

5.21 On the face of it, the introduction of KiwiSaver, together with significant government incentives, has been very successful in that the number of scheme members far out-stretches initial estimates by a considerable margin. Over two million people are now KiwiSaver members[6], that is, a little under half New Zealand's population.

5.22 Nevertheless, despite New Zealanders' high sign-up rate, BusinessNZ believes the policy principles underlying the establishment of KiwiSaver were, at best, found wanting during its development phase, with significant retirement savings' questions still unanswered.

5.23 During the entire KiwiSaver policy development phase from 2005, when the Savings Product Working Group (SPWG) produced its report, to the introduction of the details of KiwiSaver and beyond, BusinessNZ has had a consistent view of a generic work-based superannuation scheme that is based on two caveats. We were supportive of the Government introducing a work-based savings regime available to all workers, provided it was warranted and would not place heavy compliance costs on employers. While we believe the latter was answered to a certain extent during IRD's consultation work, we consider the issue of whether the scheme is warranted is still questionable.

5.24 BusinessNZ submitted on the SPWG report in 2005. The submission raised questions about whether the scheme was warranted as there had been a lack of in-depth research into the issue of savings by New Zealanders and requirements for the future. We understand other submitters raised similar concerns. However, as far as we can ascertain, these questions have still not been answered, or at most, only glanced at, mentioning selected pieces of

[5] BusinessNZ can provide a more comprehensive summary of the issues relating to our objection to introducing criminalisation of hard-core cartel behaviour in New Zealand if requested.
[6] KiwiSaver statistics as at 31 October 2012.

research. In general, the opportunity for submitters to "discuss" the need for KiwiSaver with the Government was poor.

5.25 We noted in our submission on the SPWG report that earlier work by Skilling et al. was briefly discussed but there was no mention of any research running contrary to the generic scheme proposed that would allow for argument on both sides from which a conclusion might be drawn. One notable exception to the common view that lower savings is causing problems is the research paper[7] by Scobie, Gibson and Le that looked specifically at whether New Zealanders were adequately preparing for retirement in terms of saving. The conservative assumptions by Scobie et al. provided tentative evidence suggesting there might not be widespread under-saving for retirement as some had concluded, including by those aged under 35. Furthermore, the paper found that for many New Zealanders who are on low incomes and cannot save for retirement, the amount they would receive from New Zealand superannuation would largely be no different from their existing wages. Therefore they would not feel the 'pinch' of lost income once they retired. Although the findings in no way implied that every individual was saving adequately, the results were consistent with overseas findings and we believe the paper made a valuable contribution, casting doubt on the need for a generic scheme such as KiwiSaver.

5.26 Limitations on any real discussion about the actual need for KiwiSaver were also a feature of the Bill's RIS, the quality of which BusinessNZ seriously questioned. The RIS discussed the results of an Australian survey into attitudes to saving, work by the Retirement Commission in 1996, and an AMP survey in 2002. However, there was no mention of any domestic research that might run contrary to the perceived need for the scheme or of overseas evidence of the potential pitfalls encountered when introducing a generic work-based scheme, nor was there any consideration of the need for research of this kind to be undertaken.

5.27 BusinessNZ still has deep concern regarding various aspects of KiwiSaver and questions the need for the scheme given the lack of research to determine whether the scheme is warranted. There is international evidence from our closest economic neighbours that often such schemes do not have the desired outcome. There are also concerns about the role of providers. We believe KiwiSaver is like many other taxation and savings changes currently being rushed through the legislative process.

Building seismic performance – no clear case for intervention

5.28 While the examples examined above all share similar traits of poor early regulatory analysis and problem definition, it could be argued that recent changes to regulatory processes will improve aspects of a system that has often been found wanting. In some cases this has occurred, but in others there is still a lack of rigour in the way evidence is compiled and decisions made. A more recent example involves the issues relating to seismic building performance.

[7] *Saving for Retirement: New Evidence for New Zealand,* New Zealand Treasury Working Paper.

5.29 The early 2013 MBIE consultation document providing a cost benefit analysis on improving New Zealand's earthquake-prone building system stated that costs would be $1.7 billion and benefits $37 million. This did not take any account of economic loss for commercial and industrial businesses and their capita, nor was there any mention of compensation for potential regulatory takings, nor any analysis of the potential economic implications for particular regions.

5.30 BusinessNZ considered the RIS sub-standard in that without adequate qualification it dismissed alternatives to legislative intervention such as more market-based approaches. The one-size-fits-all approach took no consideration of different regions' seismic risks and in BusinessNZ's view was way out of line in respect to other regulatory interventions targeted at reducing risk.

5.31 BusinessNZ's sees it as important to understand up-front that there is an optimal amount of resource which should be utilised in reducing the risk of failure in earthquake-prone buildings, just as there is an optimal amount of resource that should be spent on crime prevention, health interventions etc. The crucial and undeniable fact is that resources are limited and risk cannot be completely eliminated, not at least without great cost. While it may be possible to reduce risk, beyond a certain point the marginal cost of taking action becomes progressively higher, while the potential returns lessen. Consequently, it pays for companies and individuals to invest in risk minimisation strategies only up to the point at which the marginal cost equals the marginal benefit of taking action.

5.32 The consultation document correctly pointed out that there was no such thing as an earthquake-proof building – any building may fail if the earthquake is big enough…*"Therefore, the system must strike a balance between protecting lives and the economic costs of strengthening or demolishing the most vulnerable buildings"* (p.5).

"….designing an earthquake-prone building system involves balancing life and safety considerations, on the one hand, with the economic cost of dealing with risky buildings on the other. The optimal balance might be described as an "acceptable level of risk." (p.9).

5.33 Where government intervention is clearly justified as a result of established market failure, it is important that resources are directed to interventions which provide the greatest bang for buck. This requires sometimes unpalatable choices to be made between funding, say, health care interventions (and which specific types), transport policy decisions, building codes etc. There are almost always trade-offs to be made between greater cost, monetary cost or other costs such as restrictions on freedom on the one hand, and reduced risk on the other.

5.34 While it almost goes without saying that the 'benefits of regulation must outweigh the costs' in order for regulation to be justified, it is also important to analyse not only total costs and benefits (including potential unintended costs

and/or benefits) but also where these expected costs and benefits might fall. For example, if the benefits are widely dispersed but the costs fall disproportionately on one group (in this case building owners), there may be a case for compensating that particular group or at least for providing a reasonable length of time in which to change systems, processes or whatever may be causing significant externalities. The impact on particular industry sectors and firms within sectors needs careful consideration to avoid some of the costs associated with potential regulations.

5.35 Given that markets are generally faster at self-correcting than government intervention, the onus of proof must be on government to prove beyond reasonable doubt that the benefits of intervention exceed the costs, including unintended costs associated with regulation (such as non-compliance).

5.36 Moreover, it should be noted that regulators generally have strong incentives to minimise their own risk by imposing higher standards than might arguably be justified. Because regulators do not bear the costs associated with their decisions (costs which will ultimately be passed on to consumers), they may well over-regulate rather than be aware of, or adequately consider, the cost/quality trade-offs consumers are willing to make. Given that each individual is unique, individuals will generally have different risk profiles, with some willing to pay a considerable amount to minimise risk while others will want to invest little in reducing real or perceived risk.

5.37 The consultation document implied that consumers and companies should not be allowed to manage risk and that regulation is a more appropriate mechanism for providing certainty of outcome. While it is possible that regulation may provide for greater certainty (though not necessarily of outcome), that certainty is likely to come at a considerable cost, which will ultimately flow through to consumers. The consultation document failed to recognise that increasing regulation involves trade-offs.

5.38 It is premature to make the proposals outlined in the consultation document without a clear understanding of the scale of earthquake-prone buildings in New Zealand. This point seems to be acknowledged in the Consultation Document, but then largely ignored: *"Better information is needed about the scale of the earthquake-prone building problem across New Zealand in order to identify and confirm costs, and to help policy-makers and the public understand and respond to the issue."* (p.12). Therefore, BusinessNZ recommended to government that before proceeding further, work should be undertaken to clarify the implications of the document's proposals, including the potential for any unintended outcomes.

Regulation & Governance of the Electricity Sector

5.39 From BusinessNZ's point of view, New Zealand's electricity sector has provided a number of both positive and negative examples that the NZPC should examine. One example involves comparing the objectives of both the Electricity Commission and Electricity Authority.

Electricity Commission – multiple and confused objectives

5.40 The now disestablished Electricity Commission was created when the industry could not, in 2003, decide a suitable self-regulatory model. The Electricity Commission's objective was *"to ensure that electricity is produced and delivered to all classes of consumers in an efficient, fair, reliable, and environmentally sustainable manner"* (s 172N(1)(a)); and *"to promote and facilitate the efficient use of electricity"* (s 172N(1)(b)). From BusinessNZ's point of view, these conflicting objectives were bad enough. However, there was more. For example:

> *S 172N(2) Consistent with those principal objectives, the Commission must seek to achieve, in relation to electricity, the following specific outcomes:*
>
> *(a) Energy and other resources are used efficiently:*
> *(b) Risks (including price risks) relating to security of supply are properly and efficiently managed:*
> *(c) Barriers to competition in the electricity industry are minimised for the long term benefit of end users:*
> *(d) Incentives for investment in generation, transmission, lines, energy efficiency, and demand side management are maintained or enhanced and do not discriminate between public and private investment:*
> *(e) The full costs of producing and transporting each additional unit of electricity are signalled:*
> *(f) Delivered electricity costs and prices are subject to sustained downward pressure:*
> *(g) The electricity sector contributes to achieving the Government's climate change objectives by minimising hydro spill, efficiently managing transmission and distribution losses and constraints, promoting demand side management and energy efficiency, and removing barriers to investment in new generation technologies, renewables, and distributed generation.*

5.41 In other words, the Electricity Commission had multiple and confused objectives which was complicated by the fact that it had no clear ex ante or transparent definition for making the trade-offs between them. In fact, they were so diverse and complex in the context of the electricity market that there was no obvious way in which the trade-offs would be made. For example, it was not simply a matter of determining whether security of supply would predominate over productive efficiency, but environmental and social objectives somehow had to be incorporated.

5.42 Ultimately, the Electricity Commission used its judgement to make the trade-offs in a non-transparent manner. This resulted in a regulatory outcome akin to a lottery, and as a result, the industry adjusted upwards its risk adjusted rate of return and investment slowed to the point that the then government was

required to procure stand-by plant (it purchased Whirinaki thermal plant in the Hawkes Bay) to ensure sufficient security of supply.

Electricity Authority – a clear objective

5.43 In stark contrast, it is useful to compare the above situation to the establishment of the Electricity Authority. The Authority's statement was deliberately simplified to the following:

> *15: Objective of Authority*
> *The objective of the Authority is to promote competition in, reliable supply by, and the efficient operation of, the electricity industry for the long-term benefit of consumers.*

5.44 As can be seen, the objective of the Authority was elegant in its simplicity. Furthermore, the Authority, as one of its first acts on its establishment, then set about defining how it would determine what its objective meant – in other words – how the trade-offs would be worked through.

5.45 The best place to see how these were worked through is via the Authority's set of foundational documents, and specifically to the document it developed and consulted upon on the definition of its statutory objective, which can be viewed here

http://www.ea.govt.nz/our-work/consultations/corporate/statutory-objective/

The Interpretation of the Authority's statutory objective clarifies how the Authority:

1. Interprets its statutory objective;
2. Will assist the Board to make consistent decisions; and
3. Will assist staff and advisory groups to develop Code amendments and market facilitation measures for the Board's consideration.

Environmental Protection Authority – mutually positive outcomes

5.46 As another example which provides positives that the NZPC could examine, we commend the emerging practices of the Environmental Protection Authority (EPA). This is an operational entity, responsible for implementing the law in two key areas – these being the emissions trading scheme and the recently passed into law Exclusive Economic Zone (EEZ) Act which regulates petroleum and mineral activity beyond the 12 nautical mile limit.

5.47 The EPA has taken an open and consultative approach to the development of its regulatory framework and has listened (though not always agreed with) industry views. This conversation, which commenced even before the EEZ law had been passed, has been viewed extremely positively by industry who feels that they have had the chance to influence the attainment of mutually positive outcomes, rather than the usual sense of regulators simply shedding all of the possible risks they can on to industry.

Regulation, funding, strategy and governance of the tertiary education sector

5.48 From a BusinessNZ perspective, New Zealand's education sectors provide a number of examples that the NZPC should examine.

Tertiary education – balancing multiple objectives, making trade-offs, and meeting the Tertiary Education Strategy Priorities

5.49 It is not at all clear how current regulatory and funding processes and practices and the regulatory institutions in the tertiary education sector give effect to or enhance the Government's educational, economic, social, environmental and cultural outcomes, particularly with respect to the Government's Tertiary Education Strategy, and its Business Growth Agenda.

5.50 The Education Act requires the Government to set out the strategic direction and priorities (medium and long term) for tertiary education to "foster and develop a tertiary education system that –

- fosters, in ways that are consistent with the efficient use of national resources, high quality learning and research outcomes, equity of access, and innovation;
- contributes to the development of cultural and intellectual life in New Zealand;
- responds to the needs of learners, stakeholders, and the nation, in order to foster a skilled and knowledgeable population over time;
- contributes to the sustainable economic and social development of the nation;
- strengthens New Zealand's knowledge base and enhances the contribution of New Zealand's research capabilities to national economic development, innovation, international competitiveness, and the attainment of social and environmental goals; and
- provides for a diversity of teaching and research that fosters, throughout the system, the achievement of international standards of learning and, as relevant, scholarship.

5.51 The Tertiary Education Commission, the New Zealand Qualifications Authority, and Careers New Zealand must take into account the objectives outlined above. In addition, the Tertiary Education Commission must give effect to government policy when directed to do so by the responsible Minister. The TEC's principal legislated function (159f), under the Education Act 1989 is to give effect to the Tertiary Education Strategy's (TES) strategic priorities, including such things as:

- Delivering skills for industry
- Getting at risk young people into a career
- Boosting achievement of Maori and Pasifika
- Improving adult literacy and numeracy
- Strengthening research based institutions
- Growing international linkages.

5.52 Yet the framework within which tertiary education policy makers, regulators, funders and administrators make trade-offs between these objectives and priorities are unclear.

5.53 How should the Ministry of Business, Innovation and Employment and the Ministry of Education hold the Tertiary Education Commission, the New Zealand Qualifications Authority, and Careers New Zealand to account for delivering on these priorities? How should policy makers, regulators, funders and administrators weigh the educational, economic, social and environmental outcomes of the current central command and control approach to tertiary education (where the government sets the price, volumes, what can be taught, and is a regulator of quality), relative to more devolved and or market-based approaches to tertiary education? How should policy makers and administrators weigh economic considerations such as the employment opportunities and incomes of graduates, relative to other priorities such as environmental or social outcomes?

5.54 The links between goals and priorities to rules and regulations developed and implemented by education agencies often disregard previously identified priorities and goals and operate in a blanket like fashion regardless of risk and return. Moreover, there appears to be an inability or reluctance in the current system to choose where tertiary education investment might be best placed. All tertiary education is treated equally regardless of the public and private benefits. A more devolved and or market-based approach to the tertiary education system would mean the allocation of resources could better reflect where high returns on the tertiary education dollar might be made.

Private education sector – policies and rules oversimplify and adopt broad brush administratively expedient "solutions"

5.55 New Zealand's tertiary education sector is diverse and this diversity extends to tertiary education in the private sector. The Government, in framing its policies and rules, tends to oversimplify and adopt broad-brush, administratively expedient "solutions" which cause waves of further problems for some providers.

5.56 NZQA's "Rule 18" clearly illustrates the problem. The single mechanism, "External Evaluation and Review", a new process – unevenly conducted in its first round and subjective - was used to reward some education providers and penalise others. It was a poor vehicle for identifying and eliminating unethical providers which was a main objective.

5.57 The Government continues to use External Evaluation and Review to divide the country's quality English language providers. With changes in policy (most recently Immigration Policy: Work Rights for International students), some schools will have doubled in value while others will have halved. Dramatic and unexpected shifts in policies and the not fully rational or transparent differential treatment of education providers make operating a business in the education sector high risk and may cause international students to opt for one of our many competitor countries.

Appeals processes inadequate

5.58 The Education Evaluation and Review process carried out by the NZQA is subjective and the appeals process involves only the initial decision maker. For example, if an ITP or PTEs (all of whom are required to go through the Education Evaluation and Review process) disagree with the final report they then appeal back to NZQA and if still not resolved, the appeal goes to a lawyer. In instances where there is no resolution an external mediator might be a more sensible solution.

Too much focus on managing risk

5.59 Immigration NZ has improved considerably. However, there are still many examples of student visas being refused for a wide variety of reasons – some of which appear to be unreasonable. The student visa approval system could be improved by following a practice adopted by Australia where there is a small group of people who the education provider can "appeal" to with the reasons for the visa refusal examined immediately and decisions made.

Conflicting and overlapping functions

5.60 Another area the warrants closer attention concerns temporary work visas where both Immigration NZ and Work and Income come together as part of the "labour market check" process.

5.61 Immigration NZ refers many work visa applications to Work and Income for labour market advice on the availability of New Zealanders for the job in question and Work and Income may have unrealistic ideas about who can fill vacancies. The results help Immigration NZ to determine whether the application can be approved.

5.62 There is tension between Immigration NZ's role to support economic development and Work and Income's to reduce unemployment. The labour market check process illustrates a conflict between two government agencies which has been poorly managed. The lack of a transparent and consistent framework within which the labour market check process occurs can adversely impact firm profitability and productivity, especially when visa renewals are involved.

Recommendation: That the New Zealand Productivity Commission should take into account the examples provided in our submission when examining poor regulatory processes.

6. APPENDIX 1

Background Information on BusinessNZ

6.1 Encompassing four regional business organisations Employers' & Manufacturers' Association, Employers' Chamber of Commerce Central, Canterbury Employers' Chamber of Commerce, and the Otago-Southland Employers' Association), its 71 member Major Companies Group comprising New Zealand's largest businesses, and its 76-member Affiliated Industries Group (AIG), which comprises most of New Zealand's national industry associations, BusinessNZ is New Zealand's largest business advocacy body. BusinessNZ is able to tap into the views of over 76,000 employers and businesses, ranging from the smallest to the largest and reflecting the make-up of the New Zealand economy.

6.2 In addition to advocacy on behalf of enterprise, BusinessNZ contributes to Governmental and tripartite working parties and international bodies including the ILO, the International Organisation of Employers and the Business and Industry Advisory Council to the OECD.

6.3 BusinessNZ's key goal is the implementation of policies that would see New Zealand retain a first world national income and regain a place in the top ten of the OECD (a high comparative OECD growth ranking is the most robust indicator of a country's ability to deliver quality health, education, superannuation and other social services). It is widely acknowledged that consistent, sustainable growth well in excess of 4% per capita per year would be required to achieve this goal in the medium term.

APPENDIX 2

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25 March 2013

Minister or CEO
Govt Department
Address

Dear *name of Minister or CEO*

Re: Disconnect between government priorities and regulations placed on business

Background
I am writing to you regarding BusinessNZ's increasing concern at the disconnect between the Government's priorities for growth and new regulations being considered.

We would like to point out that we support the Government in its four overarching priorities that look to build a more competitive and productive New Zealand economy. In particular, we are already engaged with two aspects of the business related priorities, including delivering better public services and the Business Growth Agenda (BGA).

An increasing disconnect
The Government is now working on over 300 separate actions to improve conditions for business growth. While these actions are all aimed at building a more competitive and productive economy, we would first like to point out that there is an increasing and significant disconnect between them and the Government's day-to-day regulatory decisions. This is not a specific industry or departmental problem, but rather one that goes across much of Government. Our concerns have recently been included in letters to Ministers, as well as in submissions on certain discussion documents, and we believe they need to be known across every department that typically deals with business.

As you may be aware, we have previously been critical of the quality/rigour of regulatory decision-making, and have advocated for some years improvements to the regulatory frameworks typically used by officials. While some changes have been initiated, these have not addressed the fundamental problem we continue to see, which is a failure to meet RIS and cabinet manual standards or statements on better and less regulation. Also, while a series of priorities has been created, in many quarters it appears those priorities are currently undermined.

In addition, the 300 plus actions as part of the BGA also present problems as the implementation of some can in fact turn a pro-growth action into an anti-growth one.

Overall, a variety of policies collectively give business community members a sense that seemingly endless and undeserved additional costs are being placed upon them, increasing frustration levels and possibly leading to non-compliance.

New Zealand Productivity Commission's view

We note that these broad concerns are not confined to the private sector. The New Zealand Productivity Commission's draft report on its current inquiry into Local Government Regulatory Performance[8] is very critical of central Government's processes for making policy and regulation. Their chapter in the draft report goes into a fair amount of detail, but the following quote is telling:

> *"The Commission has found a number of shortcomings in the way that regulations are made at the central level – these including a lack of implementation analysis, poor consultation and weak lines of accountability. While these shortcomings are not universal across all agencies, they are common enough to be of concern."*

Furthermore, the draft report outlined work conducted by Castalia Strategic Advisors in 2012, which found that only 36% of the 42 Regulatory Impact Statements (RIS) reviewed fully met Cabinet's quality requirements. Therefore, while the Government's priorities for growth have become a central point for policy development, there also needs to be a corresponding improvement in the quality of regulatory decisions so that the private sector can clearly see that the Government is heading in one direction for growth.

Also, we wish to point out that we would not expect every regulatory decision to align perfectly with government priorities. Given the political settings in which policy is developed, there will be instances where the Government decides that other priorities must take precedence. However, a number of recent proposals or government decisions do not appear to correspond with any more pressing priority. In short, much regulatory decision making currently occurring will hinder, rather than help, in achieving the Government's end goal.

Examples of poor and/or questionable regulatory decisions

To illustrate the degree to which poor regulatory decisions are being made across government, we have outlined 11 examples, although more were provided in terms of feedback on this issue when in discussion with members. These are a combination of issues BusinessNZ has recently canvassed, as well as asking our broad membership - regional associations, affiliated industries group and major companies group - to provide examples in their own areas where a disconnect is clearly evident.

Table 1: Examples of Regulatory Decisions and Government Priorities

Building/Construction
Building Seismic Performance discussion document: The proposals outlined in the document will require all non-residential and multi-unit, multi-story residential buildings that do not meet the earthquake strength of 1/3 of the new building standard to be demolished or strengthened within 15 years (5 years for assessments and 10 years to take the appropriate action). The benefit cost analysis states that costs will be $1.7 billion, and benefits only $37 million. This does not take any account of economic losses to commercial and industrial businesses and their capital. There is no mention of compensation for potential regulatory takings or any analysis of the potential economic implications for particular regions. The RIS is simply sub-standard, dismissing, without adequate qualification, alternatives to legislative intervention such as more market-based approaches. The one-size fits all approach takes no account of the seismic risks of different regions and in BusinessNZ's view is way out of line in respect to other regulatory interventions targeted at reducing risk.
Building Amendment Bill No.4's changes to the Dam Safety Scheme: In response to concerns about the compliance costs due to be imposed by the Dam Safety Scheme, the current Government in 2009/10 undertook an independent review of the scheme. The independent reviewer recommended an increase in the size thresholds for a 'large dam' to remove many of the small dams (many of them on farms) that would pose little or no risk to the public.

[8] Towards Better Local Regulation: Draft Report (December 2012)

Regional councils opposed these changes and the Government struck a compromise which was put forward in the Building Amendment Bill when it was introduced in 2010. This compromise kept the existing large dam definition, but put in a second higher threshold tier that would effectively exclude most farm dams from the Scheme. Relevant business associations, like Federated Farmers supported the Bill, but after hearing submissions, the Local Government and Environment Select Committee made changes which will potentially capture even more small dams than currently (making the regulation even more onerous rather than less, which was the aim of the independent review).

Tax

Overview Concerns with Tax Policy: While we do not have a fundamental problem with changes to tax policy that look to provide for broader-based and low tax rate changes, tax policy changes and statements of clarification targeted to businesses need to take into account the trade-offs between quality tax policy, total tax take and the costs/benefits for business. Unfortunately, many recent proposals for increased tax revenue give far greater weighting to the tax revenue increase than to business compliance costs. In short, recent proposed changes are insufficiently pragmatic. They do not recognise that a purely principled approach is not the best way forward for enhancing New Zealand's growth.

FBT on Car Parks Legislation Despite work by officials over 2012, which included various rounds of consultation with key stakeholders (including BusinessNZ), the proposed changes involving Fringe Benefit Tax on car parks were still not at a stage that they should proceed, particularly as RIS states that the changes will bring in only $17m additional revenue. While we acknowledged that the new rules are intended to protect the revenue base from FBT on car parks being eroded, we believed that any benefits gained will be more than outweighed by the additional compliance costs that businesses will face. Although the proposed changes have now been withdrawn, they provide a good example of the discontent between perceived benefits and costs for the wider economy.

Employee Allowances Discussion Document & Commissioners' Statement: Overall, the various proposals outlined are generally pragmatic and should proceed. However, we had significant concerns regarding the changes to the communications aspect of employee allowances. Although three options were examined, the decision was to tax any employee expenditure payment when there is mixed work and private use of the communication devices. However, this option was beyond what was necessary, and did not provide for a level of pragmatism required when dealing with a rapidly changing communications landscape. Like FBT on car parks, the Government has indicated that this proposal will not proceed, but shows a lack of pre-consultation with interested parties that would have minimised what followed in terms of the reaction from the business community. Although the proposed changes to Accommodation allowances were generally pragmatic, the discussion document was then followed up by the Commissioner of IRD who released a statement on the current income tax treatment of accommodation payments, which included a retrospective aspect that will affect many businesses.

Removal of Tax Credit Children Working: The removal of the child tax credit and the requirement for employers to deduct tax from 1 April 2013 has had the effect of hugely multiplying payrolls for companies that employ children, such as those in the newspaper business. For example, one community newspaper business will increase their payroll from 50 staff to 350. There is a requirement for IR330 to be collected from all these children, and in turn for all the children to have IRD numbers. In reality, one is talking about collecting tax on only $10 a week for many children.

The only way to defer this cost is to make the children contractors rather than employees – which still means having the correct paperwork – thus putting the burden back on the child and their family to file a tax return and pay the taxes due.

Business & Consumer Law

Consumer Law Enforcement Provision – Unfair Contract Terms: While we have always fundamentally opposed the introduction of unfair contract terms into New Zealand's consumer law because of a severe lack of evidence that such enforcement provisions are required, the current commencement date for unfair contract terms will be six months after the Bill goes into law. However, given offshore examples (in particular Australia), we believe this period needs to be extended to 18-24 months, given the current timeframe would be insufficient for many businesses to make the necessary changes.

Notwithstanding a query about the need for the regulation itself, there is simply no need to rush the commencement of this enforcement provision, considering that the costs to business will significantly outweigh any benefit to consumers.

Financial Reporting for Companies & Limited Partnerships: Current legislation before Parliament proposes reducing the preparation time for issuers and companies to complete their end of year financial statements from five months to three months.

The reason for this is that the IMF proposed a filing time limit of four months, which would have reduced the current 5 months plus 20 days timeline to 4 months plus 20. The associated Cabinet Paper states that the option of reducing the time by one, instead of two months, was considered, but consistency between the public and private sectors was the overriding factor.

Because of existing time pressures in the public sector, the Government has reasoned that private sector entities should be able to match public sector performance. At best this view is short sighted. At worst, it sets a dangerous precedent, indicating a view within Government that there is little to separate the resources and day-to-day operations of the private and public sector.

Criminalisation of Serious Breaches of Certain Directors Duties: The initial Amendment Bill looked to change Clause 4 of the Companies & Limited Partnerships Amendment Bill via Sections 131 and 135, whereby every director of a company who does not act, or omits to do an in breach of the duty in sections 131 (duty of

directors to act in good faith and in best interests of company) or 135 (reckless trading) commits an offence if he or she knows that the act or omission is seriously detrimental to the interests of the company and will result in serious loss to the company's creditors.

Despite little evidence that this was a widespread problem, the proposed penalties for committing such offences of up to five years in jail or up to $200,000 in fines would involve applying a faulty test that will judge commercial risk with hindsight.

To its credit, the Commerce Committee decided to consult further on this aspect of the Bill, stating *"we are aware that the Bill could be perceived by directors and their advisors to criminalise legitimate business risk-taking behaviour"*. However, the revised legislation consulted on is no better, and the business community believes it is in no way a positive step towards ensuring the day-to-day risk-taking that is part of running a business is not adversely affected. In short, no formulation improves the existing laws in this area. Therefore, the various attempts to make wording changes for the purposes outlined by the Government will most likely end in creating a chilling effect on legitimate business risk-taking, not to mention discouraging able people, woman included, from taking up directorships.

Specialist Industry Concerns

Aviation: The Minister of Transport in May 2012 requested officials to report on a changed rule environment for aviation training by 30 June. However, there has been little or no progress on this matter. An independent report has assessed international aviation training as being potentially be worth around $180M to the New Zealand economy by 2015.

There has been extremely limited progress on the issue with Officials indicating to the industry that if it wants the rule changes then it will have to pay for it or gain international certification at a cost of upwards of $100k to the industry. While Officials have talked commitment to the growth agenda, evidence is patchy. Officials may be well meaning, but the industry is a technical field and the expertise lies in the Civil Aviation Authority, not the Ministry of Transport. This is in contrast to the maritime sector where there is expertise in the Ministry at a high level.

Crown Minerals Amendment Bill/SoP: Lifting the prominence of the health and safety requirements, especially in light of the Pike River tragedy and the report of the Royal Commission, is an understandable and laudable objective.

However, it is not clear that either the health and safety related changes proposed in the Crown Minerals Amendment Bill, or now in SoP 152, are the best long-term solution for the Crown, the sector, or its employees. There are questions in the business community whether the progressive (and now extensive) proposed blurring of the boundary between the Crown Minerals regime (targeted at the efficient extraction of Crown-owned resources) and the health and safety regime (targeted at the prevention of harm to all persons at work) is appropriate. Instead, it is likely to contribute to the creation of a confusing and over-lapping patchwork of regulatory requirements that will ultimately prove counterproductive to the objectives of the reforms and the attainment of improved health and safety outcomes.

Other, better avenues to achieve improved health and safety outcomes are available and should be vigorously pursued. This will enhance the possibility of achieving clear, well-focused law while minimising the risk of double-jeopardy and ultimately, avoiding bad law.

Proposed Joint Regulatory Scheme for Therapeutic Products: Given the New Zealand government and the Australian government have announced the establishment of an Australia New Zealand Therapeutic Products Agency (ANZTPA), there are significant concerns that this means steps are being taken towards another trans-Tasman alignment that simply mimics the current Australian regulatory scheme, without taking the New Zealand context into account. In addition, the simultaneous release of the Therapeutics Goods Administration proposal paper in Australia indicates that the outcome of this review will be included in ANZTPA. Therefore, despite officials stating that consultation will start from a 'clean slate', this does not appear to be the case. However, ANZTPA should not blindly adopt current Australian processes.

I look forward to discussing this letter with you in due course.

Yours sincerely

Phil O'Reilly

Chief Executive

Cc:
Hon Bill English – Minister of Finance
Hon Stephen Joyce – Minister of Economic Development
Hon Judith Collins – Minister of ACC
Hon Dr Jonathan Coleman – Minister of State Services
Hon Craig Foss – Minster of Commerce and Consumer Affairs
Hon Simon Bridges – Minister of Labour
Hon Peter Dunne – Minister of Revenue
David May – Chief Executive, Accident Compensation Corporation
Naomi Ferguson- IRD Commissioner, Inland Revenue Department
David Smol – Chief Executive, Ministry of Business, Innovation and Employment
Wayne McNee – Chief Executive, Ministry for Primary Industries
Iain Rennie - State Services Commissioner, State Services Commission
Gabriel Makhlouf - Secretary to the Treasury and Chief Executive, The Treasury
Wayne Eagleson – Chief of Staff, New Zealand Government