



New Zealand Law Society

Law Society Building, 26 Waring Taylor Street, Wellington 1, New Zealand
P.O. Box 5041, Wellington, DX SP20202, Tel (04) 472-7837, Fax (04) 473-7909
Email inquiries@lawyers.org.nz World Wide Web <http://www.lawyers.org.nz>

9 July 2007

Commerce Act Review
Ministry of Economic Development
PO Box 1473
WELLINGTON

By email: commerceactreview@med.govt.nz

Review of Regulatory Control Provisions under the Commerce Act 1986

The Society's Commercial and Business Law Committee (the Committee) appreciates the opportunity to comment on the Ministry of Economic Development discussion paper *Review of Regulatory Control Provisions under the Commerce Act 1986* (the Paper).

The proposals in the Paper would considerably improve the operation of the regulatory control provisions in the Commerce Act 1986 (the Act).

Purpose Statement

A separate "purpose statement" for Part 4 of the Act is proposed. The objective in the Act is to "promote competition in markets", yet section 52 in part 4 of the Act seeks to address situations in which competition is not practicable. A separate purpose statement for Part 4 of the Act will provide clarification.

The focus of the purpose statement, to ensure that suppliers in markets where competition is not practicable face similar incentives and constraints as those in competitive markets, is appropriate but could be broadened to encourage competition.

Criteria for when control may be imposed

As outlined in the Paper, the current criteria for when control may be imposed is very broad. The new test proposed is a considerable improvement, focusing on the trade off that has to be made between the benefits of intervention, and the costs of doing so. The proposed test also provides an appropriate balance between efficiency and other components that need to be taken into consideration in the decision to impose control.

In the last paragraph of the test it is suggested that the wording should be refined to include the word "substantially" rather than "clearly". This provides a better level of guidance for regulators in determining whether or not to impose control, and sets the threshold at a level which is both reasonable and justifiable from the perspective of a business which may be subject to the possibility of control.

Expanding the scope of regulatory provisions

The Paper suggests that it is worthwhile considering whether firms should have a role in proposing their own regulatory control regime. There are some benefits to this approach. For example, it would provide an incentive for firms that may be subject to regulatory control to provide more information in pursuit of an acceptable regulatory end. This would address the asymmetry of knowledge problem between the regulator and regulated, and provide a better basis for coming to an agreement about effective regulation. The suggestion that the Commission be required to accept a proposal which meets preset criteria for reasonableness would also improve both the ways and means of regulation. However, rather than the Commission predetermining the criteria for “reasonableness”, this should be undertaken via delegated legislation.

This removes the ability of the Commission to change the criteria for achieving the reasonableness test in any given situation. It may be that if the ability to set the criteria remains outside delegated legislation then it would be appropriate for the parties to agree what the predetermined criteria should be between themselves, rather than the decision resting solely with the Commission.

Threshold regime

The Paper considers two options in respect of Part 4A of the Commerce Act:

- Part 4A be retained and amended so that its threshold approach can be applied to other sectors of the economy; or
- Part 4A be repealed and replaced by the ability to put sectors under an amended Part 5 control regime which uses comparative benchmarking or customised control terms proposed by an individual firm.

The second option is preferable.

Input Methodologies

As noted in the Paper, in the context of a regulatory inquiry, input methodologies matter. They determine the quality and value of both the business and the regulatory outcome. For the reasons outlined in the Paper, transparency, predictability and as noted above the quality of regulatory outcomes, it is necessary to ensure that input methodologies are mutually agreed, or at least determined via consultation in a stand alone process prior to a regulatory inquiry into whether and how to impose regulation.

The Paper queries whether the methodologies should be in the form of guidelines and set by the Commission, or in the form of Rules and set by the Minister on the recommendation of the Commission. As long as the consultation process for setting the input methodologies is robust, and submitters’ views are appropriately taken in to account, it is probably an irrelevant question as to whether the Commission or the Minister is responsible for formalising the methodologies.

It would be useful if there were an appeal or escalation process within the consultation process for circumstances where an effective arrangement in determining the methodologies cannot be reached.

Accountability Mechanisms

Given that the businesses that are likely to be the target of regulation are usually important to both the regional and national economies, are natural monopolies, and are infrastructural in nature, it is important that the Commission's decision making processes are transparent and accountable. It is essential to establish this accountability through the creation of a merits review process. Notwithstanding the other considerations above which contribute to the necessity for a merits review process, simple natural justice provides an adequate reason for establishing such a process.

While the Paper notes that there are costs in respect of merits review, these should be reasonable compared to the costs of poorly made regulatory decisions without the prospect of effective review other than by way of the court process.

A number of other jurisdictions with more mature regulatory regimes have established merits review as a way of providing an adequate avenue for addressing inadequacies in the regulatory decision making process. It would be an appropriate reflection of the development of our regulatory framework to establish such a process in New Zealand.

The Committee trusts that these comments are of assistance. Please contact the committee secretary Sarah Barker, by email sarah.barker@lawyers.org.nz or phone (04) 463 2967 if you wish to discuss anything further.

Yours sincerely

A handwritten signature in black ink, appearing to read 'John Horner', written in a cursive style.

John Horner
Convener, Commercial & Business Law Committee