

Regulatory Alert

01 April 2010

Boosting New Zealand's economic performance: Will a Productivity Commission save the day?

If the Government's recently announced proposals proceed as planned, New Zealand will soon have a new Productivity Commission ("**Commission**") charged with boosting our economic performance and improving the quality of regulation. This initiative, jointly announced by Finance Minister Bill English and Regulatory Reform Minister Rodney Hide, is intended to be up and running by April 2011.

The establishment of such a Commission has been under consideration since the National-ACT confidence and supply agreement was signed. The 2025 Taskforce report released in November 2009 (also prepared as part of the National-ACT confidence and supply agreement) recommended that the Government establish a Productivity Commission. It is understood that Treasury has been working on the question of a Commission for months and, as early as July last year, Bill English was exploring this issue in talks in Australia. This perhaps explains the otherwise optimistic announcement that legislation will be in place as soon as the end of this year (this timeframe will require a Bill to be introduced within the next few months).

"It is understood that Treasury has been working on the question of a Commission for months and, as early as July last year, Bill English was exploring this issue in talks in Australia."

The Commission is intended to be modelled on its Australian counterpart. Like Australia, it is proposed that the Commission will be independent (here it will be an independent Crown Entity which essentially means that, while it must comply with its statutory functions, it is not

required to follow Government policy directions). Its functions will also mirror Australia, specifically:

- (i) inquiries into productivity-related matters and reporting back to Ministers;
- (ii) one-off reviews of existing regulations;
- (iii) reviews of the efficiency and effectiveness of regulatory agencies;
- (iv) regulatory impact analysis of a small number of proposed new regulations;
- (v) research into productivity-related matters, to build up its institutional knowledge; and
- (vi) promotion of public understanding of productivity-related issues.

As in Australia it is proposed that, while a Commission report will be tabled in Parliament, there will be no requirement that the Government follow its recommendations (or even provide reasons why recommendations are not followed).

This initiative is to be welcomed. However, the hard question needs to be asked: will this Commission improve productivity in New Zealand and/or will the costs of a new Commission justify the results (approximately \$2.5 million to set up and \$5 million each year to run)? In this context it is informative to consider (a) the activities of the Australian Productivity Commission ("**APC**") and (b) issues which could benefit from a Commission inquiry or review in New Zealand.

Australian Productivity Commission

The APC's role, expressed simply, is to help governments make better policies in the long term interest of the Australian community. Its focus is on ways of achieving a more productive economy - the key to higher living standards. Its work covers all sectors of the economy and extends to the public and private sectors.

The APC's work includes consideration of the effectiveness of price regulation, for example, it has:

- (a) provided a benchmarking study comparing Australian telecommunications prices, price changes and regulatory arrangements with those in nine other OECD countries;
- (b) prepared a research paper on the price effects of regulation of international air passenger transport, telecommunications and electricity supply; and
- (c) studied trends in prices in electricity and gas sectors to consider whether these are generally consistent with regulation/reform objectives.

An example of the potential impact of the APC on regulatory approaches is its inquiry into airport regulation (at the request of the Minister). The APC made recommendations relating to the asset valuation set by Australian Consumer and Competition Commission ("ACCC") (similar to our Commerce Commission). The Government accepted the recommendations (although was not bound to) and directed the ACCC to implement these directions.

Other recent work of the Commission in the regulatory field includes reports on: gambling regulations (26 February 2010); occupational health and safety regulations (24 March 2010); food safety regulations (22 December 2009); cutting red tape in the manufacturing and distributive trades sectors (16 September 2008); chemicals regulation (7 August 2008); climate change (22 May 2008); best-practice regulation (21 December 2007); and building regulations (1 December 2004). It has also recently been studying the relative performance of the public and private hospital systems, particularly the comparative cost for clinically similar procedures.

"The New Zealand Commission will necessarily be a much smaller operation than its Australian cousin. Its success may depend on whether it can conduct sufficiently comprehensive research and inquiries within the budget provided..."

A Productivity Commission in New Zealand

The New Zealand Commission will necessarily be a much smaller operation than its Australian cousin. Its success may depend on whether it can conduct sufficiently comprehensive research and inquiries within the budget provided and/or whether there is sufficient data and systems available in New Zealand for it to efficiently perform its tasks. Further, it will be critical that it is staffed and governed by people with the appropriate expertise.

Nevertheless, it could prove to be a more efficient use of Government resources given officials already carry out some of this work under various enactments, albeit on a piecemeal basis. Specifically, it could draw on officials in Treasury, the Ministry of Economic Development and even the Commerce Commission. The Commission is also likely to be able draw on expertise and work undertaken by the APC.

A similar approach is already taken under Commerce Act and Securities Act. The APC has recently co-operated with the Commerce Commission to review consumer protection legislation in New Zealand and Australia.

"There is a real need for such a Commission in New Zealand. Our productivity falls well below Australia and we have specific issues with our current economic regulatory model which are likely to be addressed in part by this proposal."

There is a real need for such a Commission in New Zealand. There are wide spread assertions that our productivity falls well below Australia and we have specific issues with our current economic regulatory model which are likely to be addressed in part by this proposal. In particular, our Commerce Commission is responsible for a growing and diverse range of functions (perhaps understandable given New Zealand cannot necessarily afford separate bodies to undertake these functions (as in other jurisdictions)). It sets rules, implements them and, increasingly, submits on policy and law reform. A Commission could have a prominent role in the development of regulatory frameworks, which should reduce the need for the Commerce Commission to continue the policy advocacy role it seems to have assumed. The Commission would also be able to assess the performance of the Commerce Commission - improving accountability and, therefore, the quality of our economic regulatory decision-making over time (which directly impacts on productivity).

A Commission will ensure the Government receives independent and objective advice with a focus on all sectors. It should also better ensure industry regulation keeps in step with product and technological developments. At present there is no effective review procedure to monitor and make timely adjustments in response to such changes.

"It will, of course, be essential that the new legislation ensures that the Australian model operates equally effectively in New Zealand."

It will, of course, be essential that the new legislation ensures that the Australian model operates equally effectively in New Zealand. For example, at present the Government would be unable to direct the Commerce Commission to carry out a Commission recommendation (compared to Australia where, for example, the legislation enabled the Government to direct the ACCC in the airport inquiry to implement the APCs recommendation). This may require legislative changes that run counter to our Crown entity model.

Other issues

We can expect to see a new Bill no later than August given the aim to move it through the legislative process by the end of the year (unless of course, the new Bill is enacted

under urgency). It is possible that there will be general cross party support for the Bill although there may be some disagreement over the detail. The Labour party has indicated that it broadly supports the proposal. ACT will clearly support it and it is unlikely to be a key controversial issue for the Greens and the Māori Party. The critical issues will more likely be whether:

- (a) the new legislation best enables the Commission to positively impact on New Zealand's productivity (for example by empowering the Government to direct regulators to follow recommendations); and
- (b) the Government provides it with sufficient resources to properly undertake its tasks.

It could be argued that the current Government is introducing more regulation and regulatory bureaucracy contrary to its commitment to reduce regulatory red tape. However, those companies that are most heavily regulated have been calling for the establishment of a Commission for some time now, and will no doubt welcome this initiative. This reflects that the quantity of regulation is often not the real issue - it is the quality that counts. The establishment of the Commission certainly has the potential to promote improvements in that respect.

CONTRIBUTED BY CATHERINE MARKS AND CRAIG SHRIVE

REGULATORY CONTACTS:

Andrew Peterson

Partner, Auckland
andrew.peterson@russellmcveagh.com
DDI: + 64 9 367 8315
Mobile: +64 (0) 27 560 5021

Sarah Keene

Partner, Auckland
sarah.keene@russellmcveagh.com
DDI: + 64 9 367 8133
Mobile: +64 (0) 27 535 5034

Craig Shrive

Associate, Auckland
craig.shrive@russellmcveagh.com
DDI: + 64 9 367 8855
Mobile: +64 (0) 27 599 6609

Pat Bowler

Partner, Wellington
pat.bowler@russellmcveagh.com
DDI: + 64 4 819 7500
Mobile: +64 (0) 27 442 8040

James Every-Palmer

Partner, Wellington
james.everypalmer@russellmcveagh.com
DDI: + 64 4 819 7370
Mobile: +64 (0) 27 580 1616

Tim Clarke

Partner, Wellington
tim.clarke@russellmcveagh.com
DDI: + 64 4 819 7532
Mobile: +64 (0) 27 224 5843

Catherine Marks

Consultant, Wellington
catherine.marks@russellmcveagh.com
DDI: + 64 4 819 7845
Mobile: +64 (0) 27 246 2609