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CONSULTATION OBLIGATIONS ON PUBLIC SECTOR AGENCIES: A COMMERCE COMMISSION EXAMPLE

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This article outlines some of the principles by which decision makers (usually public sector but sometimes private sector) should make their decisions, using an example from an Electricity decision by the Commerce Commission.

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1 Introduction

1.1 Many decisions in the public sector must follow processes which are reviewable by the Courts. Crown Law updated its "*Judge Over Your Shoulder*"[1] in March 2005. They have done an excellent job of summarising the key issues in a straight forward fashion (a difficult thing to do given the myriad of factual and statutory variations and levels of obligation).

2 Consultation by Decision Makers

2.1 The types of decisions that are reviewable by the Courts[2] generally require the decision maker to consult with affected parties. The starting point will always be the relevant legislation (if any) but subject to that, the appropriate approach can be summarised as follows:

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[1] "*The Judge Over your Shoulder – A Guide to Judicial Review of Administrative Act Decisions*".

[2] While this is mainly a public sector issue, some decisions in the private sector are reviewable as well (examples include particular decisions by the Rugby Union, the Stock Exchange, the Royal College of Surgeons etc).

2.1.1 "*Consultation*" does not equate with "*negotiation*". The object is not necessarily to arrive at agreement.[3]

2.1.2 The parties to be consulted must have a reasonable opportunity of stating their views, and they must be provided with reasonable information.[4]

2.1.3 The decision maker must treat the consultation as more than a formality and may still act if consultees do not avail themselves of the opportunity.[5]

2.1.4 Even if there is no statute requiring consultation, appropriate governance may require consultation anyway.

2.1.5 Consultation is not required in all circumstances. For example, the decision maker may already know enough about the relevant views.

2.1.6 The decision makers must be open to changing their minds. That is so even though they may have a preferred starting option, as a basis for consultation.

3 The Commerce Commission Case

3.1 *Electra & Others v. Commerce Commission*[6] is a good example, in a regulatory context, of what can happen around the edges. How far does a decision maker need to go to meet the consultation obligation?

3.2 Parties shouldn't assume that a Commission decision is limited only to the points that are directly and squarely raised by the Commission, or by other parties, as being under review.

3.3 The Commission (and other decision makers) are entitled to say *"Enough"* when getting down to the detail of the decision being made. In this case, the Commission was making a decision on certain thresholds applicable to large electricity lines businesses. If those thresholds are met, the businesses can avoid controls being put in place. That threshold is determined by the application of a formula. The plaintiffs (trust-owned electricity lines businesses) said they weren't consulted in relation to the Commission's decision to modify the methodology by including post-tax revenue without allowing for a particular consequential adjustment.

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[3] *Wellington International Airport Limited v. Air New Zealand* [1993] 1 NZLR 71.

[4] *Hamilton City v. Electricity Distribution Commission* [1972] NZLR 605.

[5] *Hamilton City v. Electricity Distribution Commission* [1972] NZLR 605.

[6] (Wellington Registry) CIV 2004 485-389: 23 March 2005; Ellen France J.

3.4 The Commission had followed a process it often uses: the issue of a draft determination interposed by a conference, with submissions from parties throughout, followed by a final decision. It was only in the final decision that the modification was made.

3.5 After the final decision was made, and there were some limited technical steps to be taken, the trust owned businesses raised their concerns with the Commission. The Commission wrote back to say it would not make any change.

3.6 The Court decided there had been adequate consultation even though the Commission had not squarely and directly raised the proposed modification for a number of reasons. The reasons included:

3.6.1 The fundamental elements of the overall methodology remained and the Commission was taking an approach which was consistent for all lines businesses, both trusts and companies. The modification was not so distinct or important as to warrant specific mention. "*What occurred here did not equate to a "new rule" ... This aspect is also relevant in determining how many iterations the Commission has to go through. At some point, and I believe that point had been reached, the Commission has to be able to say, "Enough", and move on and make a decision.*"[7]

3.6.2 The Commission didn't have to specifically flag this issue and, in any event, it was "*on the table*" (for example, another party had raised it).

3.6.3 Anyway, after the final decision had been issued, and the points were raised by the trusts, the Commission did not have a closed mind and decided not to make an adjustment.

3.7 Decision makers need to avoid getting bogged down in an undue detail so they can get on with making decisions. They have to go far enough in the circumstances but they can reach a point where they can say, "*Enough*". As this case shows, that point might be earlier than some parties expect. The message for those being consulted is that they need to be aware that issues important to them may be decided upon even though the point has not been specifically raised and that they should err on the side of raising issues squarely.

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[7] *Electra* at para 103(e).

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