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# Two Early Christmas Presents for the Commerce Commission Chair

**December 2006**

**Commerce Commission Chair, Paula Rebstock, is co-winner of the Herald's New Zealander of the Year. Public and political support for regulators is critical. So this award is welcome. To balance this, there need to be safeguards to monitor and control regulatory action. A Court of Appeal decision in a gas industry Commerce Act case illustrates this (again, a "win" for Ms Rebstock).**

It's been a big year for the Commission. High profile Fair Trading Act prosecutions have been successful. The Commission's increased vigilance of cartels has got off to a flying start. The Court has sent a clear message supporting the Commission's approach to dealing with Commerce Act issues in an M&A context. And there is major work in progress in other areas such as the energy and telecommunications sectors.

Regulators can all too readily get it in the neck from interest groups, stakeholders, politicians etc, as the Telecommunications Commissioner and Chair of the Electricity Commission have found (for very different reasons and very different outcomes). While political involvement is a key part of the regulatory framework, real care is needed in its exercise, if the overall system is to work. Too ready to attack and we'll get impotent regulators (eg; regulators that won't stand up and act when appropriate, or inadequate regulators because great candidates won't chance it and we end up with poorly qualified regulators). Just as important, regulators will struggle to get staff, particularly given the shortage of regulatory specialists.

Chair Rebstock has had her share of criticism as well, as she and her colleagues roll out decisions that aren't popular with some stakeholders (including some highly vocal and well funded lobbyists and commercial interests). However, getting flack like that is part of the job description of a capable regulator.

Parties may not like all of the decisions that the Commission makes, but a strong regulator, that is prepared to act decisively and appropriately, is critical for our economy and the best interests of consumers.

In the Commerce Commission, we have a regulator that is prepared to engage actively, as its marked increased activity in particular areas demonstrates.

So it's great, in these fragile times, that the Herald chose, this month, Chair Paula Rebstock, as one of its two New Zealanders of the Year.

The UK experience with telecommunications illustrates this well. Whether stakeholders agree with the outcome, the relevant UK regulatory (Ofcom) has come up with an operational separation model for the incumbent telco (BT), which may succeed in overcoming otherwise insurmountable problems in telecommunications (see our online article, *Demystifying what's happening in Telecommunications Regulation*).

Key is that this would never have happened unless the regulator, Ofcom, was strong. It is well funded. Its people are highly paid. And it has made the tough calls. Yes, the UK market is much larger. But, to use telecommunications

as an example, the NZ telco industry turns over NZ$8Bn, not to mention its wider economic impacts. We're a lot smaller but surely many of our industries are plenty big enough to justify a strong approach to regulation, including resourcing and support of the regulatory bodies? Pleading a small economy is often a smokescreen for a weak approach. FUD Rules.

While a strong and supported regulator is critical, its actions must still stand up to scrutiny and be subject to review (as Commissioner Rebstock herself has pointed out). One of the key mechanisms is judicial review by the Courts.

Judicial review of decisions, such as those of the Commerce Commission, has followed an evolutionary path over many years. The last year or two has seen significant developments.

The evolution often addresses the line between when a court will and will not intervene. A facet of that evolution is the procedural aspect of judicial review.

In November 2006, the Court of Appeal reversed a High Court decision which went against the tide. It's gone on appeal: *Commerce Commission and Anor v. Powerco Ltd and Vector Ltd*[1]. The Commission recommended to the Minister, under Part 4 of the Commerce Act, that price controls be imposed on natural gas distribution by Powerco and Vector. The Minister in turn introduced price control. Powerco and Vector sought judicial review of these decisions.

Judicial review proceedings typically involve an exchange of affidavits (and sometimes other procedural steps such as discovery). Discovery issues were considered by the Court of Appeal. However, here, we'll deal with the High Court's decision that Commission Chair Rebstock (and Commission officials and experts) could be cross examined on their affidavits.

The Court of Appeal reversed this decision, noting that, while judicial review can be complicated and drawn out, the aim is still to aspire to "*a relatively simple, untechnical and prompt procedure*".[2]

Therefore cross examination will generally only be allowed where it is demonstrated to be **necessary**. Even if it is allowed, the issues that can be subject to cross examination must be defined closely and be as limited as possible.

The Court of Appeal also confirmed that cross examination on relatively technical matters will be rare. Cross examination is more likely to be allowed where there is an issue of credibility.

That despatched the question of whether Commission officials and experts could be cross examined. Because the issues were technical in nature rather than issues of credibility, cross examination was disallowed.

For Commissioners themselves, there is a general rule that, except in very unusual cases, cross examination is not allowed. It was not demonstrated that cross examination was clearly necessary on the particular topics at issue in this case. So, Commissioner Rebstock also escaped cross examination for this reason too.

Pervading judicial review is a need to draw a line as to how far the Court will intrude in decision-making and how far it will go, procedurally, to delve into issues that arise.

This case is an illustration of that point. Judicial review is never going to be a panacea for all problems with Commission or other decision-making. It involves compromise in terms of approach. Further, as the Court of

[1] CA 123/06, 9 November 2006; Glazebrook, Robertson and Ellen France JJ.

[2] Para 40 of the judgment, citing from *Petrocorp*.

Appeal noted, the availability of judicial review in itself is a means of ensuring accountability for the Commission's decisions (and there are other procedural steps that can be taken within judicial review, such as interrogatories).

These two stories illustrate that a strong regulator is important for New Zealand's economy, but the regulator's actions also need to be the subject of appropriate scrutiny.

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