

OUTPUT AGREEMENT

between

**THE MINISTER OF COMMERCE AND CONSUMER
AFFAIRS**

THE MINISTER FOR COMMUNICATIONS

and

THE COMMERCE COMMISSION

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SECTION 1.0

1.1 PARTIES TO THE OUTPUT AGREEMENT

This Output Agreement (the Agreement) is a composite accountability document:

BETWEEN

Ownership Minister:

- The Minister of Commerce and Consumer Affairs, in respect of ownership performance of the Commission (including the purchase of major litigation activity on behalf of all Purchase Ministers).

Purchase Ministers:

- The Minister of Commerce and Consumer Affairs in respect of outputs to be provided through Vote Business, Science and Innovation: Commerce and Consumer Affairs. In this capacity, the Minister of Commerce and Consumer Affairs is also purchasing services on behalf of the Minister of Primary Industries;
- The Minister for Communications, in respect of outputs to be provided through Vote Business, Science and Innovation: Communications.

AND

- The Commerce Commission (the Commission).

1.2 PURPOSE AND SCOPE

The objective of this Output Agreement is to establish expectations of performance for the outputs to be provided by the Commission. This Agreement enables Ministers to monitor and hold the Commission accountable for its performance. In addition this Agreement sets out the operational rules for the Litigation Fund.

1.3 TERM AND ALTERATION

This Agreement commences on the date it is signed by all parties and will remain in force until it is replaced with a new Agreement.

It may be amended at any time by mutual written agreement between the Ministers and the Commission.

SECTION 2.0

2.1 ACCOUNTABILITY FOR OUTPUTS AND PERFORMANCE

The Commission will deliver its outputs in accordance with the performance standards set out in the Government's Performance Information for Appropriations (Estimates) and with those set out in the Commission's Statement of Performance Expectations (SPE). Should there be differences between the outputs in the Estimates and the SPE the Commission will communicate this and the reason for it to monitoring officials.

2.2 MINISTERS' ADVISERS

The Commission recognises that the Ownership Minister and Purchase Ministers have appointed the Ministry of Business, Innovation and Employment (MBIE), and Ministry of Primary Industries (collectively known as the “monitoring departments”) to:

- provide input into the Commission’s strategic direction setting process, which includes working with the Commission in the development of its Statement of Intent;
- monitor the performance of the Commission in terms of implementing its strategic direction and meeting Ministers’ expectations;
- monitor the Commission’s performance against the performance measures set out in its Statement of Performance Expectations;
- manage the Crown’s ownership and purchase interests in the Commission, including monitoring risks to the Commission’s on-going capacity to carry out its statutory functions;
- work constructively with the Commission to improve performance measurement and reduce compliance costs; and
- advise Ministers on key issues and developments in policy areas related to the Commission’s operation.

2.3 FUNDING GUIDELINES

2.3.1 Payment of Appropriations

The Purchase Ministers, on behalf of the Crown, will pay the Commission up to the amount of the appropriations as set out in the Estimates. MBIE (acting as the administering department for Vote Business, Science and Innovation, through which relevant appropriations are made to the Commission) will action payments to the Commission in accordance with a disbursement schedule agreed between the Commission and monitoring departments at the beginning of each financial year. The monitoring departments, with the agreement of the Commission, may amend the schedule of payments during the year to reflect updated forecast expenditure.

2.3.2 Return of Funding Relating to Leviable Activities

If the Commission has received more appropriation than it has spent in the financial year in respect of any activities for which costs are recoverable by the Crown through an industry levy, this amount will be returned to the Crown before the end of the second quarter of the following financial year, or as agreed with the monitoring departments.

2.4 MAJOR LITIGATION

2.4.1 Background

The Commission may undertake or be party to major litigation under the full range of legislation for which it has enforcement responsibility, and in defending challenges to its decision-making and powers. This litigation is unpredictable in regard to both timing and size. Such litigation may extend beyond the level of litigation activity the Commission is able to manage within its routine litigation functions and resourcing. Thus funding is set aside to directly meet this need, provided specific criteria are met for its use.

2.4.2 Multi-Category Expenses and Capital Expenditure: Commerce Commission Litigation Funds

The appropriation *Multi-Category Expenses and Capital Expenditure: Commerce Commission Litigation Funds (Litigation Fund)* provides the means to support the Commission in meeting its major litigation responsibilities.

Within the appropriation Litigation Fund is the category "Internally-Sourced Litigation" which provides \$3.5 million specifically allocated to fund the Commission's internal capability to undertake major litigation, and which may be used for:

- i. salary costs of internal staff, including support staff, associated with major litigation; and
- ii. overhead or indirect costs associated with major litigation.

The appropriation is paid in advance in accordance with a disbursement schedule agreed between the Commission and monitoring departments at the beginning of each financial year (see 2.3.1).

The Litigation Fund appropriation also contains the category "Externally-Sourced Litigation", which is used to meet the external direct costs of resourcing major litigation activity. This category will include a ring-fenced amount of \$0.5 million per annum that will be used to fund the Litigation Cost Reserve, a fund used to cover court costs awarded against the Commission. The ring-fenced amount will be paid out on the first quarter of each financial year, until such time that the Litigation Cost Reserve reaches its maximum amount of \$3 million.

Any unused funding that has been disbursed to the Commission will be returned to the Crown after the end of each financial year, consistent with section 2.3.2 above.

Alternatively, the Ministers of Finance, and Commerce and Consumer Affairs have the delegated joint authority to transfer at the end of the financial period any unspent balance of the Litigation Fund to the next financial year. The Minister of Commerce and Consumer Affairs has the delegated authority to approve a transfer between categories of the appropriation within the year.

2.4.3 Criteria

The Commission will access the Litigation Fund appropriation only in relation to litigation that it has assessed as meeting the criteria set out below.

Access to the appropriation will be restricted to eligible cases, being cases:

- i. With total external costs estimated to be not less than \$200,000 (GST exclusive), with such costs:
 - to exclude Commission overheads;
 - to be calculated as follows, as the case may be:
 - from the time when the Commission instructs legal counsel with a view to possible litigation, until the completion of the case; or
 - for the period from the decision of the initiating party to take legal process involving the Commission, until the completion of the case;

- ii. relating to any regulatory regime the Commission is responsible for enforcing; or
- iii. involving international, national, major network, or other major companies, or a major issue affecting a particular industry; or
- iv. requiring the use of:
 - senior external legal counsel;
 - consultants and expert witnesses (e.g. economic, accounting, engineering, scientific); or
- v. where there is a risk of costs of the order of \$100,000 (GST exclusive), being awarded by the Courts for or against the Commission.

Where the criteria apply and a decision is taken to use the Litigation Fund, then the Fund may be used regardless of whether litigation eventuates, or the matter is settled, or a decision is taken not to proceed.

2.4.4 Application of the Criteria

The above criteria for the Litigation Fund are designed so that the Commission is always in a position where it can effectively (and without delay) commence or continue with major or complex proceedings involving expenditure that would be difficult to accommodate within normal budgetary provisions.

If circumstances change, cases that have not been eligible may subsequently be assessed as being eligible. For such cases, only forward costs, incurred after the Commission has assessed a case as meeting the criteria, may be charged against the Litigation Fund. Costs incurred prior to the assessment cannot be charged to the Fund retrospectively.

The Commission incurs preparatory costs prior to filing proceedings. Provided that the criteria are met and on the basis that it envisages undertaking litigation, the Commission may transfer the case to the Litigation Fund to cover such costs.

2.4.5 Court Costs, Pecuniary Penalties and Interest

Cost awards against the Commission

Costs awarded by the court against the Commission in relation to Litigation Fund cases will be a charge to the Litigation Fund appropriation.

Cost awards in favour of the Commission

Costs awarded by the court in favour of the Commission (and any out of court settlements involving the payment of costs to the Commission) will be apportioned between the Crown and the Commission. This apportionment will occur on the basis of the proportional contribution to costs made from the Litigation Fund and the applicable appropriations.

The court cost awards attributed to the Crown will be returned to the Crown at the end of each tri-annual period.

The receipt of cost awards by the Commission will not increase the appropriation, without Cabinet approval.

Pecuniary penalties

Pecuniary penalties awarded by the court and collected by the Commission on behalf of the Crown will be returned to the Crown within a week of their receipt.

Interest earned

Interest earned will be recorded in each tri-annual report and returned to the Crown at the end of each tri-annual period and will not increase the sum which the Commission is entitled to spend in any year, without Cabinet approval.

2.5 REPORTING

2.5.1 Tri-annual and Annual Reporting

The Commission will provide the monitoring departments with tri-annual reports which highlight the Commission's activities of note during the period and describe the progress towards the delivery of outputs set out in the Statement of Intent and Statement of Performance Expectations. Recognising that the Commission produces an Annual Report, the final tri-annual report will be replaced by providing a (near to final) copy of the draft Annual Report (unaudited) as provided to Audit New Zealand.

The Commission will also provide a report to the monitoring departments on the Litigation Fund. The Litigation Fund report will form part of the first and second tri-annual reports and will be provided as a separate document to the annual report.

Each tri-annual report will contain:

- an Executive Summary, including a high level overview of how the Commission is addressing Ministerial expectations, and any material risks to achieving expected performance;
- performance results for that period and for the year to date relative to the targets set out in the Statement of Performance Expectations;
- An overview of financial performance covering expenditure against budgets and forecasts for the period and for the year to date relative to the budgets set out in the Statement of Performance Expectations;
- If output or financial performance is not as expected, explanations as to why this has occurred, regardless of whether it is positive or negative, and what action the Commission is taking in response;
- An outline of, and update on, key initiatives that the Commission is undertaking to develop its internal capacity as set out in its Statement of Intent and/or in response to specific performance expectations;
- Any fiscal risks to the Crown and/or any risks that could limit the effectiveness of the Commission in carrying out its statutory functions;
- Information regarding the Commission's reserves, how it is used, and any risks associated with the level of its reserves.

2.5.2 Litigation Fund Reporting

The reporting on the Litigation fund will include:

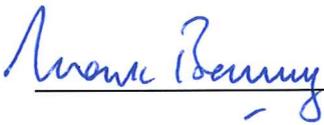
- actual expenditure for the period and year to date against budget and any subsequent full year forecasts, and specific cases within the Fund;
- information that allows assessment of how litigation resources are spent across different sectors (general competition enforcement, fair trading and the different regulated sectors);
- information showing costs awarded against the Commission in the period and for the year to date and the impact of any such payments in relation to this on the litigation costs reserve;
- information that shows court cost awards in favour of the Commission for the period and year to date, and the proportions that are to be returned to the Crown;
- details on pecuniary penalties received or due; and
- details of interest earned.

The Commission will provide these tri-annual reports to the monitoring departments no later than 30 working days after the end of the relevant period. The Commission will endeavour to provide the reports as early as feasible within this timeframe if circumstances allow.

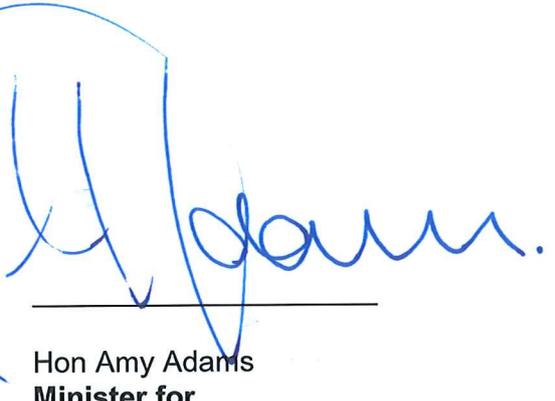
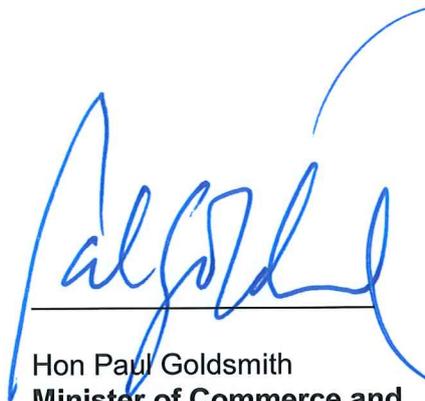
The above formal reporting requirements should not limit the provision of information through personal interaction between the Commission, the Ownership Minister and Purchase Ministers, and monitoring departments.

SECTION 3.0

3.1 SIGNATORIES



Dr Mark Berry
Chair
Commerce Commission



Hon Paul Goldsmith
**Minister of Commerce and
Consumer Affairs
as Purchase Minister for
Vote Business, Science and
Innovation; Commerce and
Consumer Affairs**

Hon Amy Adams
**Minister for
Communications
as Purchase Minister for
Vote Business, Science and
Innovation;
Communications**

Date: 20.10.16

Date: 18.10.16

Date: 18.10.16