



# Petition 2005/78 of John Andrew Dickson

Report of the Commerce Committee

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## Petition 2005/78 of John Andrew Dickson

### Recommendation

The Commerce Committee recommends to the Government that the Government consider making an appropriate ex gratia payment to Mr Dickson in recognition of events that contributed to the loss of his opportunity to pursue his legal rights, and the considerable effort and legal expense he has incurred in seeking clarification from the Commerce Commission and in petitioning Parliament.

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### Introduction

We have considered Petition 2005/78 of John Andrew Dickson, a stock and station agent, requesting

That the petitioner be compensated because of the losses that he suffered directly from the activities of the Commerce Commission, the Examiner of Trade Practices, and the Secretary for Commerce having regard to

- including as a condition of approving the merger undertakings by the parties to the merger which the Commission, the Examiner of Commercial Practices and the Secretary for Commerce ought to have known could not be enforced if breached.
- the Commission's failure to immediately advise the petitioner that it had no power and or authority to require Wrightson's to honour the undertakings outlined in decision 172 while investigating complaints lodged by Dickson Lambeth & Associates in October 1987 and March 1988 and by Dickson Livestock in April 1992.

The petition continues:

In assessing the amount of compensation due to the petitioner regard is had to the amount of his claim filed in the High Court proceedings being based on loss of profits for Dickson Livestock for the period 1988 through to 1996 of \$5,895,980 plus an allowance for interest and costs.

### Background

This petition, along with its two predecessors, has a lengthy history. Its origins lie in the 1986 merger between Wrightson NMA Limited (Wrightson) and Dalgety Crown Limited (Dalgety). In essence, Mr Dickson submits that he suffered losses as a result of the Commerce Commission's approval of the merger subject to conditions which could not be enforced, and its failure to advise him promptly that the conditions could not be directly enforced.

Mr Dickson seeks compensation for the resulting loss of profits over the period 1988 to 1996, amounting to \$5.896 million, plus an allowance for interest and costs.

**Summary of facts<sup>1</sup>**

The merger between Wrightson and Dalgety required the approval of the Commerce Commission. When the application was filed, the Commerce Act 1975 was in force; however, by the time the merger actually received Commerce Commission approval, the Commerce Act 1986 had replaced it. The commission, after hearing submissions on the matter, decided that the 1975 Act still applied to the merger proposal and gave its approval (Decision 172) under the 1975 Act, subject to certain conditions designed to facilitate competition in the stock and station industry. The 1975 Act allowed conditions to be set; however, no conditions are permitted in the case of a merger approval under the 1986 Act.

Within a year after the merger, Mr Dickson, in his livestock business, began to experience difficulties in obtaining access to North Island stockyards. This led him to make a number of complaints to the Commerce Commission between 1987 and 1992. Mr Dickson challenges the adequacy of the commission’s responses to these complaints. Consideration of Mr Dickson’s complaints led to questions being raised as to whether the conditions imposed at the time the merger was approved were directly enforceable and, if they were not, how they might otherwise be enforced. Ultimately, the commission concluded that they were not directly enforceable and advised Mr Dickson of this. Shortly after this, in January 1993, Mr Dickson’s company went into liquidation—as a result, he maintains, of competition constraints. The liquidator initiated legal action based, in part, on breach of the merger conditions, but this was struck out as being out of time.

The losses claimed in the petition were estimated by an independent valuer on the basis of a calculation of what Mr Dickson might have earned over the period 1988 to 1996 if he had had access to other saleyards.

**History of complaints over access to saleyards**

Mr Dickson is not alone in his concerns over access to saleyards; complaints by livestock companies have surfaced regularly over the years. We are aware of at least three investigations of complaints by the Commerce Commission:

- In 1986, objections were raised at the time of the Wrightson–Dalgety merger. The Examiner of Trade Practices initially refused to agree to the merger, eventually doing so only on the basis that assurances provided by Wrightsons would be included as conditions integral to the merger approval (Decision 172).

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<sup>1</sup> A more detailed chronological account is contained in the Commerce Committee’s 2003 report on an earlier related petition by Mr Dickson.

- Between 1990 and early 1992 several complaints against Wrightson and Elders by livestock companies, including by Mr Dickson's, were investigated as a package by the commission. In 1992/93 it found that a breach of the 1986 Act had occurred, but that the case was not strong enough to justify taking it to the High Court. Hence, the commission sought and obtained an administrative settlement in 1993 whereby Wrightson agreed to modify its conditions for access to saleyards.<sup>2</sup>
- Between 1993 and March 1996 the commission continued to receive complaints from livestock agents alleging that they had been refused access to saleyards in breach of the Act. In its investigation report dated April 1996 the commission stated that it was unable to enforce the conditions of access set out in Decision 172 and that the 1993 administrative settlement was unenforceable as the statutory time limit had expired.

The commission also investigated the acquisition of Williams & Kettle Limited by Wrightson in December 2004. In allowing the acquisition, it concluded that "although the acquisition had increased the percentage shareholding Wrightson previously held in various important saleyards, Wrightson's power to deny access to those saleyards had not changed as it already had effective control over them."<sup>3</sup>

We are aware that issues have remained since then over access to saleyards, with concerns that smaller companies are being excluded, and understand that at least one case has been filed with the Commerce Commission, in 2005.<sup>4</sup>

### Previous petitions

Two previous petitions from Mr Dickson on this matter have been considered by the Commerce Committee. The first, in 1997, was considered premature as it was not clear at the time that Mr Dickson had exhausted his legal remedies. The petition lapsed with the dissolution of Parliament in 1999. A second petition, 2002/6, seeking an inquiry into the activities of the Commerce Commission in investigating his complaints, was reported on by the Commerce Committee on 20 June 2003.

The majority report on that petition concluded as follows:

We consider that generally the Commission responded promptly to requests for information and complaints from Mr Dickson. However, the Commission could have been more explicit in its responses and considering the Commission was aware that Mr Dickson was contemplating litigation it was at fault not to ensure that Mr Dickson was personally informed of the outcome of its investigations at the earliest opportunity. We recommend that the Government ensure that the Commission has in place a timely and accurate system of notification regarding the outcomes of its investigations. We also recommend that the Government review the Commission's current correspondence and documentation policies to ensure its current systems are efficient and accurate.

A minority view in that report concluded as follows:

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<sup>2</sup> By the time of this settlement, however, Mr Dickson's business had gone into liquidation; the commission failed to notify him of the outcome, as a result of an oversight.

<sup>3</sup> See paragraph 88 of Commerce Commission Decision No.556.

<sup>4</sup> See, for example, New Kid Wants to Play with Big Boys in *The New Zealand Farmers Weekly*, 12 December 2005, noting that Manchester Livestock Company filed a case in 2005 to gain access to saleyards.

The National Party and New Zealand First members consider that faced with the above facts, a reasonable person would have to conclude that the Commission performed incompetently with respect to Decision 172 and its failure to acknowledge the conditions so central to the decision could never be enforced...

It is the recommendation of the National Party and New Zealand First members that the Crown should consider an appropriate level of compensation for the damage suffered by Mr Dickson as a consequence of the incompetent performance of the Commission in its handling of Decision 172.

The Commerce Commission responded that it did not accept the accuracy of the minority view as to the facts or its view of the legal position.

The Government responded to the committee's report in September 2003. It reported that it was satisfied that the events of the Dickson petition arose out of a lapse in systems and processes that appeared to be relatively sound for that time, and noted that the commission had since improved its systems. A follow-up review of the commission's record-keeping systems was carried out for the Commerce Committee by an independent person in 2005 and was reported to the House. The matters addressed by that review have been dealt with and are not at issue in this petition.

### **The current petition**

We understand that Mr Dickson was prompted to re-lodge his petition in 2005 by information that emerged following the commission's approval of Wrightson's takeover bid for Williams & Kettle. In particular, he was struck by the commission's statement in Decision 556 that the acquisition was unlikely to result in any increase in Wrightson's power to deny access to various important saleyards as it already had effective control over them. He was also surprised by the commission's acknowledgement that the 1986 Act applied in dealing with complaints received between 1990 and 1992, and that a breach of the Act had occurred. In his view, this contrasted with advice he had received as late as April 1995 that the 1975 Act was still relevant.

### **Conduct of our investigation**

The current petition was referred to the Commerce Committee of the 48th Parliament on 1 November 2006, and was reinstated in the 49th Parliament on 9 December 2008. The committee referred the petition to the Ombudsman for investigation and report under section 13(4) of the Ombudsmen Act 1975. A thorough investigation was commenced in 2007 by the Chief Ombudsman, the late John Belgrave; following his death this work was taken over and completed by Ombudsman David McGee, who reported to us in June 2009.

The report offered a number of comments and opinions (the summary conclusions are attached as Appendix B), with the sole recommendation that the committee meet the petitioner to hear his concerns. We promptly did so, as we were concerned to learn that, despite three petitions over more than a decade, Mr Dickson had not previously had an opportunity to present his case in person. We spoke with Mr Dickson and his lawyer for over an hour on 30 July 2009.

We provided a copy of the Ombudsman's report to the Commerce Commission for comment, and have considered its very detailed response. We also wrote to PGG Wrightson seeking information about some of the history of the issue. Unfortunately, with the passage of time, documents that might have clarified some details of events cannot be found.

Hon Dr Lockwood Smith joined us for our meetings, as he had been Mr Dickson's Member of Parliament at the time of the earlier petitions and was familiar with the history of the matter.

### **Committee consideration**

We have reviewed the issues raised by this petition at length. While the facts do not differ from those presented to the previous committee in Petition 2002/6, we have had the benefit of considering the Ombudsman's report, which has impressed us with its thoroughness and impartiality. We have also taken the opportunity to hear the petitioner present his case. We found this very useful in clarifying the background to his concerns, and were struck by his integrity and patience.

The Commerce Commission provided us with very detailed comments on the issues raised by the petition, and in response to the Ombudsman's conclusions—with which it largely disagrees. We have considered the commission's comments carefully, and while we must say that we find its views somewhat protective of its position, we appreciate the care with which it has examined the history of this matter going back two decades, and has addressed each point in detail.

The Ombudsman's report and the Commerce Commission's response are among the committee's papers on this item of business and are publicly available.

### **Crown entities named in petition**

The petition concerns three Crown entities: the Commerce Commission, the Examiner of Commercial Practices (originally the Examiner of Trade Practices and Prices), and the successor of that officer, the Secretary of Commerce. We accept the Ombudsman's conclusion that there is no evidence of fault on the part of the Examiner; our report therefore focuses on the Commerce Commission.

### **Approval of the merger under the 1975 Act**

A central conclusion reached by the Ombudsman is that, in his opinion, "for what it is worth", the Commerce Commission was not correct in applying the Commerce Act 1975 to the Wrightson–Dalgety merger, but should have declined to rule on the application and invited Wrightson and Dalgety to submit a new application for determination under the 1986 Act. The Commerce Commission disagrees with this conclusion and the emphasis placed on it in the Ombudsman's report, and considers that its own decision to proceed in approving the merger under the 1975 Act remains correct.

It is important to note that in expressing his opinion, the Ombudsman does not question the validity or effectiveness of the commission's approval, or suggest that it be revisited.

That approval remains valid and effective according to its terms. Only a court of competent jurisdiction could disturb it. Given the passage of time since it was given, it is inconceivable that this would ever occur.<sup>5</sup>

We do not consider that it is necessary, productive, or perhaps even possible for us to resolve the issue of which Act should have applied in considering the merger. While we are inclined to share the Ombudsman’s view, we are also aware that a select committee is not a court of law.

We believe the significance of this issue is that there was, as the Ombudsman described it in his report to us, “an inherent contradiction in imposing 1975 Act conditions in a 1986 Act era.”<sup>6</sup> This inherent contradiction appears to explain the difficulties experienced by Mr Dickson in obtaining a clear statement from the commission in order to understand whether the conditions of the merger were enforceable in their own right or whether enforcement action would be directed at apparent breaches of the Commerce Act 1986.

This lack of clarity in his dealings with the commission is a significant part of Mr Dickson’s concern. We consider that it partly explains Mr Dickson’s course of conduct in not initiating his own legal action under the 1986 Act while there was still time to do so. It may be that Mr Dickson placed greater weight on the existence of the conditions than was warranted. It is also open to question whether he would have avoided losses if the conditions attached to Decision 172 had been enforced, or if the merger had been approved under the 1986 Act with no conditions attached. However, we agree with the Ombudsman, who concludes:

Rightly or wrongly, determining the matter under the 1975 Act with conditions attached created an impression that those conditions were directly enforceable by the Commission. Mr Dickson was diverted down this path. The Commission did not unequivocally disabuse him of their significance and or even raise the question of their enforceability until November 1992 after five years of dealings between them.<sup>7</sup>

We discuss below the issue of how the commission handled its communications with Mr Dickson.

### **The commission’s advice and handling of complaints**

We have spent considerable time reviewing the correspondence between Mr Dickson and the Commerce Commission, and related material. In the process, we have developed an insight into the considerable frustration Mr Dickson has experienced in trying to obtain action from the commission to enforce competition in livestock saleyards, or to get clarity on the course of action he should follow.

Mr Dickson first wrote to the commission expressing concern about access to saleyards in October 1987, just over a year after the Wrightson–Dalgety merger. He stated that “the merger is totally unsatisfactory as we don’t know when we are going to be asked to leave”, and noted that, while he would like to expand his business into other saleyards, he had

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<sup>5</sup> Report of the Ombudsman to the committee, paragraph 30.

<sup>6</sup> Ibid, paragraph 49.

<sup>7</sup> Ibid, paragraph 37.

been told he did not stand a chance. He asked the commission for a copy of the merger approval, “plus, if you can assist us in any possible way, we would be grateful”. The commission promptly provided (and invoiced him for) a copy of Decision 172, but appears to have taken no action on his request for help.

Subsequently, Mr Dickson complained to the commission on three occasions:

- In March 1988, regarding access to Tuakau saleyards and a fee imposed by Elders. The commission responded with a list of 19 questions about the operation of saleyards, to which Mr Dickson replied. There is no documentary evidence of further action.
- In August 1989, regarding increased fees at Wellsford saleyards. The commission investigated, and concluded in March 1990 that there was “little evidence to suggest a breach of the Act”. It advised Mr Dickson that it was open to him to take private action under the 1986 Act.
- In April 1992, Mr Dickson lodged three complaints about exclusion from saleyards, which were incorporated with complaints by other parties into a wider investigation, completed in May 1993, after Mr Dickson’s company had gone into liquidation. Mr Dickson was not advised of the outcome.

In his report to us, the Ombudsman reviewed the commission’s handling of these four enquiries or complaints, and concluded that the matters raised in 1987, 1989, and 1992 were given full and appropriate consideration. However, he says it appears more likely than not that Mr Dickson’s 1988 complaint about access to saleyards lapsed without any outcome being reached, and comments as follows:

The omission to complete the 1988 inquiry must be seen as potentially significant. The reason is that of timing. The complaint was made less than two years after Decision 172 was released, and almost five years before Dickson Livestock Associates went into liquidation. Had the Commission determined that Mr Dickson’s complaints about restriction of access had substance, it would then have had the opportunity to consider whether corrective measures should be put in place. Any corrective measures may subsequently have assisted Mr Dickson and had the effect, over time, of improving his financial position.

However, any suggestion that Mr Dickson’s companies would have significantly benefited from a completed investigation of his 1988 complaint must remain speculative.<sup>8</sup>

We agree with the Commerce Commission that it is not its responsibility to provide legal advice. We also note that it informed Mr Dickson on at least two occasions, in 1990 and 1992, that it was open to him to obtain his own legal advice. However, we do believe he was entitled to some clarity concerning the enforceability of undertakings that the commission itself obtained in order to support competition by independents such as Mr Dickson following the merger. It was not until November 1992, only two months before

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<sup>8</sup> Report of the Ombudsman to the committee, paragraphs 70–71.

his business was placed in liquidation, that the commission provided Mr Dickson with a relatively clear statement about the merger conditions:

I understand that your view is that the conditions and undertakings relating to the Wrightson/Dalgety merger are legally binding and enforceable and therefore your complaint should be dealt with in a quick and straightforward way.

Our view is that the enforceability of those undertakings is questionable, and that seeking resolution by that line of argument would create a high level of doubt as to the final outcome.<sup>9</sup>

In our view the issue here is whether Mr Dickson was misled by the commission into thinking that the conditions could be directly enforced until it was too late for him to obtain redress through the courts. We conclude that Mr Dickson was not deliberately misled by the commission, but that their communications with him were unclear and unhelpful.

We agree with the Ombudsman that “it would have been appropriate for the Commission to have explained its position to him more fully, given the significance of the merger to the industry, that access to saleyards had been clearly identified as an issue by the Commission, and that conditions had been imposed in Decision 172 specifically to address that issue.”<sup>10</sup> We believe the time to do so was in 1988, not 1992.

That the commission did not clarify at an earlier stage that there were doubts over the enforceability of the merger conditions indicates, in our view, the inherent contradiction noted above in approving the merger under the 1975 Act after the 1986 Act had come into force.

#### **Commerce Commission’s view**

The Commerce Commission considers that the Ombudsman’s report places too much significance on the conditions attached to Decision 172, and their enforceability. In its view, “Whether the merger conditions were able to be enforced under the 1975 Act is a secondary issue. The key issue is whether there was any anti-competitive behaviour by the merged entity, whether that behaviour could be investigated and dealt with by the Commission, and if so, whether it was investigated and dealt with by the Commission.”<sup>11</sup>

The commission states that it investigated Mr Dickson’s complaints and found

- no contravention of the conditions
- no anti-competitive conduct under the 1986 Act (other than the matters dealt with in 1992).

It concludes, “Ultimately, there is no evidence that Mr Dickson’s company was the victim of any anti-competitive behaviour that could have placed Mr Dickson at any disadvantage. The Commission considers that the clearest inference to be drawn from the evidence

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<sup>9</sup> Letter from the Commerce Commission to Mr Dickson dated 13 November 1992.

<sup>10</sup> Report of the Ombudsman to the committee, paragraph 79.

<sup>11</sup> Letter dated 11 September 2009 to the committee from the Commerce Commission’s general counsel, paragraph 26.

available is that Mr Dickson, for reasons known only to him, delayed exercising whatever rights he may have had (if any) until it was too late. That is not the fault of the commission.”<sup>12</sup>

We do not support this conclusion. As we have explained, we believe that Mr Dickson acted reasonably in seeking clarification from the commission about his rights and the potential for redress; the delays arose from the commission’s poor handling of its communications with him, which led Mr Dickson to waste time trying to obtain help and clarification.

### **State of competition in the market**

We would place greater weight on the commission’s main line of argument—that it dealt appropriately with anti-competitive behaviour—were it not for the fact that concern by independent stock and station agents over access to saleyards persisted over the years.

Mr Dickson’s view, which is apparently shared by other independents, is that the large players in the industry have tended to allow independent operators into saleyards when a merger proposal was pending (in 1986, and again at the time of the Williams & Kettle merger in 2004), but then to use their market power to squeeze them out once the merger was approved. One independent was quoted in *The New Zealand Farmers Weekly* in 2005 as saying, “They [Wrightson and PGG] turned to pussy cats while they were trying to get their merger through but now they are back to the lions we always knew.”<sup>13</sup>

In citing this, we do not aim to criticise companies such as Wrightson for behaving as commercial entities in the competitive environment established by law and enforced by the regulatory overseer. The question raised by Mr Dickson’s petition, however, is whether the competitive environment was, in fact, clearly established and appropriately regulated.

In reviewing the Commerce Commission’s decisions, we are concerned by some inconsistencies in its statements about the amount of competition in the market, and believe they come down to variation in the way it has defined the market over the years.

- At the time of the 1986 merger between Wrightson and Dalgety, the commission expressed serious concern about market dominance in livestock trading, and barriers to entry for new operators. It was for this reason that, in approving the merger, it insisted on conditions designed to facilitate competition, stating,

The Commission attaches the utmost importance to the observance of these conditions, which derive in a large measure [but not solely] from undertakings by the participants. This is in spite of the less than satisfactory observance of similar conditions in the past. The Commission wishes to make it clear that, without the ability to attach these conditions, the proposal would not have found acceptance.<sup>14</sup>

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<sup>12</sup> Letter dated 11 September 2009 to the committee from the Commerce Commission’s general counsel, paragraph 31.

<sup>13</sup> *The New Zealand Farmers Weekly*, 12 December 2005.

<sup>14</sup> Commerce Commission Decision No.172, paragraph 127.

- In its 1996 investigation report, the commission concluded that there was not a separate market for livestock auctioning services or for access to saleyards. Rather, it defined a market for livestock trading services, and concluded that there was a high level of competition in this market, with no person in a dominant position and no evidence of an arrangement with the effect of substantially lessening competition in the market.
- In contrast, when it allowed the 2004 acquisition of Williams & Kettle by Wrightson, the commission concluded that “although the acquisition had increased the percentage shareholding Wrightson previously held in various important saleyards, Wrightson’s power to deny access to those saleyards had not changed as it already had effective control over them.”<sup>15</sup>

This inconsistency between a market for livestock trading services—which was subject to a high level of competition—and the market for saleyards, which it eventually admitted was effectively controlled by Wrightson, raises some questions over whether the competitive environment was, in fact, clearly established.

#### **The issue of causation**

In our view, the central issue in Mr Dickson’s petition comes down to whether losses he suffered were caused by any action or omission of the Commerce Commission. On this point the Ombudsman and the commission are in agreement that no causal connection has been established between losses suffered by Mr Dickson and any failures on the part of the commission.

Our examination of the material leads us to concur with this conclusion. We do not dispute that Mr Dickson’s business suffered losses (although we note that the commission questions this), but we consider that attribution of them to any behaviour by the commission, rather than normal commercial and economic pressures, remains speculative. We also note that it is open to question whether Mr Dickson would have avoided such losses if circumstances had been different: for example, if the conditions attached to Decision 172 had been enforced, or the merger had been approved under the 1986 Act with no conditions attached.

We considered whether Mr Dickson’s losses could be attributed to the lack of clarity in the commission’s responses to him. We agree with the Ombudsman that they could not.

Even if the Commission did indeed fail to reach a conclusion on the 1988 complaint, it does not necessarily follow that Mr Dickson’s company was thereby caused financial loss. Any detriment should in these circumstances be seen as the loss of an opportunity to have the access arrangements reviewed...<sup>16</sup>

In the absence of any proof of a direct causal link between the commission’s decisions and Mr Dickson’s losses, we cannot support the petitioner’s request for compensation. In our view, there would need to be considerably clearer evidence of a link between the various

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<sup>15</sup> Commerce Commission Decision No.556, paragraph 88.

<sup>16</sup> Report of the Ombudsman to the committee, paragraph 73.

actions and decisions of the Commerce Commission and the losses he suffered for us to recommend compensation.

We do not, however, believe that the matter rests there. We consider the nature of this petition—or rather, series of petitions—to be somewhat unusual. We have therefore examined whether there is some foundation to Mr Dickson’s concerns that might give rise to some indirect, moral obligation on the part of the Crown.

### **The moral issue**

We believe a New Zealand citizen is reasonably entitled to expect helpful clarification from an agency of the Crown about the laws it is charged with administering. In our view, Mr Dickson did not receive this.

The long history of confusing and, at times, contradictory statements to Mr Dickson, against a background of persistent concerns and complaints by independent livestock agents over access to saleyards, suggests to us that the Commerce Commission did not manage its responsibilities well in this matter.

We consider that three factors in particular are relevant:

- In approving the merger under the 1975 Act, after the Commerce Act 1986 had come into force, the Commerce Commission created an inherently confusing situation.
- Its correspondence with Mr Dickson over the period 1987 to 1992 was unhelpful regarding his understanding of the situation and his options. This failure to provide clarification contributed to Mr Dickson’s forgoing the opportunity to pursue his legal options under the Commerce Act 1986 until it was too late to do so.
- In suggesting, as late as 1995, that Decision 172 remained in force and the conditions could be enforced by the Secretary of Commerce, the commission continued to contribute to a confusing situation, which must have appeared to Mr Dickson to be a classic bureaucratic run-around.

In sum, we consider that the Commerce Commission did not perform up to the standards expected of a Crown agency in its handling of this matter. We consider that there are strong grounds for the Crown to accept moral responsibility for the prolonged confusion, which resulted in considerable frustration and legal expense to Mr Dickson in seeking clarification and redress.

We believe that the Crown should consider making an *ex gratia* payment to recognise the situation that contributed to Mr Dickson’s losing access to his legal rights under the Commerce Act 1986.

### **Need for resolution**

We are strongly of the view that after more than two decades of pursuing his concerns through the commission and via petitions to Parliament, Mr Dickson deserves to have this issue resolved once and for all. He has experienced considerable frustration, and incurred substantial legal costs, in seeking resolution. As well as the time the Commerce

Commission has spent on this issue, Parliament has devoted considerable resources to considering Mr Dickson's three petitions since 1999. Finality is needed.

### **No precedent**

We considered whether a recommendation for an ex gratia payment in this case would set an unwelcome precedent regarding Government finances in future petitions.

We rejected this position on two grounds. First, every petition before a select committee is treated individually and on its merits, with a thorough examination of the facts and details about circumstances.

Second, petitioning Parliament is an ancient and important right of citizens under our form of government. The idea that a petition should not be rightly settled for fear of setting a precedent is abhorrent to the tenets and traditions of our system of government.

### **Conclusion and recommendation**

We conclude that we can find no proof of a causal link between the actions of a Crown agency and any losses suffered by Mr Dickson that would justify the payment of compensation.

We do, however, consider that the Crown should accept some moral responsibility for the events that contributed to Mr Dickson losing the opportunity to pursue his legal rights.

We recommend that the Government consider making an appropriate ex gratia payment to Mr Dickson in recognition of events that contributed to the loss of his opportunity to pursue his legal rights, and the considerable effort and legal expense he has incurred over more than two decades in seeking clarification from the Commerce Commission and in petitioning Parliament. Some of us firmly believe that such a payment should be made.

## **Appendix A**

### **Committee procedure**

The petition was referred to the Commerce Committee of the 48th Parliament on 1 November 2006, and the committee requested a report from the Ombudsman. The petition was reinstated in the 49th Parliament on 9 December 2008. We received a report from the Ombudsman in June 2009 which we referred to the Commerce Commission for its comments. We met with the petitioner on 30 July 2009.

### **Committee members**

Hon Lianne Dalziel (Chairperson)

John Boscawen

Charles Chauvel (until 14 October 2009 and from 18 November 2009)

Clare Curran

Te Ururoa Flavell

Raymond Huo (between 14 October 2009 and 18 November 2009)

Melissa Lee

Peseta Sam Lotu-Iiga

Katrina Shanks

Jonathan Young

## Appendix B

### Summary of Ombudsman's conclusions

In summary, the Ombudsman's report

- questions whether the correct legislation was applied to the Wrightson–Dalgety merger by the Commerce Commission in 1986; and concludes that it was not
- notes that a consequence of approving the merger under the legislation preferred by the commission was that behavioural conditions would be attached to the approval
- considers that Mr Dickson may have reposed more faith in these conditions than was warranted
- concludes that Mr Dickson was disadvantaged in his subsequent conduct by his reliance on their enforceability
- considers that doubts over the enforceability of the conditions were not dealt with satisfactorily in the commission's 1986 decision and were not unequivocally communicated to Mr Dickson by the commission until 1992, shortly before his company went into liquidation
- concludes that the commission generally dealt appropriately with Mr Dickson's various complaints to it between 1987 and 1992, but that no satisfactory conclusion to a complaint he made in 1988 can be established
- considers that the failure to conclude the 1988 complaint may have prevented a timely addressing of the matters about which Mr Dickson was complaining
- notes that no causal connection has been established between losses suffered by Mr Dickson and any failures on the part of the commission
- considers that communications by the commission to Mr Dickson on various legal issues over that period were not misleading
- finds no cause for complaint in regard to actions by the Examiner of Commercial Practices
- recommends that the committee hear from Mr Dickson in person.

### Summary of Commerce Commission's comments

The commission submits that there is

- no evidence of widespread anti-competitive conduct in the markets relating to saleyards in the upper North Island between 1986 and 1996
- no evidence that the failure of Mr Dickson's company was caused by anti-competitive conduct in those markets
- no evidence of loss to Mr Dickson or his company caused by anti-competitive conduct in those markets

- no basis for suggesting that the alleged losses were in fact caused by any decision, action, or omission by the commission.

With regard to the Ombudsman's report, the commission considers that

- the report places too much significance on the conditions and their enforceability
- the conclusion that Mr Dickson may have been disadvantaged by the commission proceeding under the 1975 Act (by the existence of the conditions and the commission's failure to adequately communicate the deficiencies in the conditions) is unsupported by the evidence.